

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 40

**UNIVERSAL CAMERA CORPORATION,
PETITIONER,**

vs.

NATIONAL LABOR RELATIONS BOARD

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**Petition for Certiorari filed March 31, 1950.
Certiorari Granted May 29, 1950.**

(fols. 1-7)

Part "A"

In the United States Court of Appeals
for the Second Circuit

National Labor Relations Board, Petitioner

v.

Universal Camera Corporation, Respondent

PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

**In the United States Court of Appeals
for the Second Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNIVERSAL CAMERA CORPORATION, RESPONDENT

**PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**To the Honorable, the JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT:**

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. (1946 ed.), Supp. I, Secs. 151, *et seq.*), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against respondent, Universal Camera Corporation, New York City, and its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Universal Camera Corporation and Imre Chairman, Case No. 2-C-5760."

In support of this petition the Board respectfully shows:

(1) Respondent is a Delaware corporation, engaged in business in the State of New York, within this judicial circuit where the unfair labor practices oc-

curred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on August 31, 1948, duly stated its findings of fact and conclusions of law, and issued an order directed to the respondent, and its officers, agents, successor and assigns. The aforesaid order provides as follows:

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Universal Camera Corporation, New York City, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from discharging or otherwise discriminating against any employee because he has filed charges or given testimony under the Act, or in any other manner interfering with the right of employees to file and prosecute charges and to give testimony under the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

- (a) Offer Imre Chairman immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges;

- (b) Make Imre Chairman whole for any loss of pay he has suffered because of the Respondent's discrimination against him, by payment to him of a sum of money equal to the amount

he would normally have earned as wages during the following periods: from January 25, 1944, to the date of the Intermediate Report herein, and from the date of the Decision and Order herein to the date of the Respondent's offer of reinstatement, less his net earnings during the same periods;

(c) Post at its plant in New York City, copies of the Notice attached hereto, marked "Appendix A."¹³ Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director of the Second Region in writing within ten (10) days from the date of this Order what steps the Respondent has taken to comply herewith.

¹³ In the event that this Order is enforced by a decree of a Circuit Court of Appeals, there shall be inserted before the words "A Decision and Order" the words "Decree of the United States Circuit Court of Appeals enforcing."

(3) On August 31, 1948, the Board's Decision and Order was served upon respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to respondent's counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring respondent, and its officers, agents, successors, and assigns to comply therewith.

NATIONAL LABOR RELATIONS BOARD,

By /s/ A. Norman Somers,

A. NORMAN SOMERS,

Assistant General Counsel.

Dated at Washington, D. C., this 29th day of June 1949.

APPENDIX A

Notice to all employees Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not discharge or otherwise discriminate against any employee because he has filed charges or given testimony under the Act.

We will not in any other manner interfere with the right of our employees to file or prosecute charges and to give testimony under the National Labor Relations Act.

We will offer to Imre Chairman immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed and make him whole for any loss of pay suffered as a result of the discrimination.

(Employer.)

By

(Representative.) (Title.)

Dated -----

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

DISTRICT OF COLUMBIA, ss:

A. Norman Somers, being first duly sworn, states that he is Assistant General Counsel of the National Labor Relations Board, petitioner herein, and that he

is authorized to and does make this verification in behalf of said Board; that he has read the foregoing petition and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information and belief.

/s/ A. NORMAN SOMERS,
Assistant General Counsel.

Subscribed and sworn to before me this 29th day of 1949.

/s/ ROSE MARY FILIPOWICZ,
Notary Public, District of Columbia.

My Commission Expires March 15, 1953.

[SEAL]

(fals. 8-100)

Part "B"

APPENDIX TO PETITIONER'S BRIEF

**IN THE UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNIVERSAL CAMERA CORPORATION, RESPONDENT

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 2-C-5760

In the Matter of UNIVERSAL CAMERA CORPORATION and IMRE
CHAIRMAN

DECISION AND ORDER

On February 18, 1947, Trial Examiner Sidney L. Feiler issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the complainant and counsel for the Board filed exceptions and supporting briefs. The Respondent submitted a brief in support of the Trial Examiner's Intermediate Report.

On March 4, 1947, the Board granted the request of the complainant and the Respondent for oral argument before the Board. On May 12, 1948, the Board reconsidered its action and rescinded its leave for oral argument, with leave to the parties to submit, within 20 days from the date of notification, a supplemental brief or written argument in lieu of oral argument originally requested.

Pursuant to the provisions of Section 3 (b) of the Act, as amended, the Board has delegated its powers in connection with this case to a three-man panel consisting of the undersigned Board Members.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the Trial Examiner's findings of fact with certain exceptions noted below, but reverses his conclusions and recommendations.

The Trial Examiner found that the evidence failed to sustain the allegation of the complaint that Chairman was discharged in violation of Section 8 (4) of the Act.¹ We disagree. In

¹The provisions of Section 8 (4) of the National Labor Relations Act, which the complaint alleged was violated, are contained in Section 8 (a) (4) of the Act as amended by the Labor Management Relations Act, 1947.

our opinion, a preponderance of the evidence shows that Chairman's discharge was due to the Respondent's resentment against Chairman because he had testified for the Union at a representation hearing on November 30, 1943. We believe that the Trial Examiner, in finding otherwise, failed to appreciate the strength of the *prima facie* case against the Respondent established by the evidence and erroneously credited certain implausible testimony adduced by the Respondent in explanation of the circumstances leading up to Chairman's discharge.²

As fully detailed in the Intermediate Report, the record shows conclusively that Chairman incurred the hostility of the Respondent, and especially of Chief Engineer Kende, who ultimately discharged him, by testifying favorably to the Union's position, and unfavorably to the Respondent's at the Board hearing in a representation case on November 30, 1943. Politzer, Chairman's immediate superior, warned Chairman in advance not to testify for the Union;³ and a few hours after Chairman's appearance as a witness, Kende angrily upbraided him for testifying. On the following day, Kende, in conference with Politzer and Personnel Manager Weintraub, launched an investigation of Chairman's record for the purpose of finding an excuse to discharge him. Both Kende's own testimony and Politzer's contemporaneous statements to Chairman and Goldson show beyond any reasonable doubt that this search for a pretext was motivated by Kende's indignation over Chairman's testimony. The net result of this conference on December 1 was that neither of the causes for discharging Chairman then suggested by Kende proved feasible. Politzer assured Kende that Chairman was efficient and a few days later also reported,

² It appears that the Trial Examiner in weighing the evidence in this case was guided by a standard more rigorous than was laid down in the Act for the guidance of the Board in performance of its fact-finding function. The Board is only enjoined to predicate its findings on a *preponderance* of the evidence, not a conclusive quantum, and it may, of course, draw reasonable inference as to such matters as motive which cannot in the nature of things be proved other than circumstantially (*N. L. R. B. v. Bird Machine Co.*, 161 F. 2d 589 (C. C. A. 1); *N. L. R. B. v. Abbott Worsted Mills, Inc.*, 127 F. 2d 438 (C. C. A. 1); *N. L. R. B. v. American Laundry Machinery Co.*, 138 F. 2d 889 (C. C. A. 2)).

³ Politzer was in charge of the maintenance employees whose unit grouping was the issue in dispute in the representation proceeding. Together with Chief Engineer Kende, he testified for the Respondent at the same hearing at which Chairman testified. Politzer knew that Chairman sympathized with the employees' efforts to secure separate bargaining representation, and he told Assistant Engineer Goldson that "the Company knew" that Chairman was "with the men." Politzer was obviously in a position to know the Respondent's attitude and probable intentions regarding Chairman's appearance as a witness for the Union, and we find that his warnings are evidentiary of the Respondent's animus against Chairman. It is entirely immaterial that, as the Trial Examiner observed, Politzer's motives in warning Chairman were "friendly."

after making inquiry as he was instructed to do, that Chairman was not a Communist. Nothing, therefore, was done about Chairman at that time.⁴

In the face of this clear evidence of the Respondent's animus against Chairman and its desire and intention to discharge him because of his testimony at the Board hearing if a pretext could be found, it was incumbent upon the Respondent to go forward to show convincingly that when Chairman was actually discharged—by Kende himself—8 weeks later, ostensibly because of an episode that was then stale, the real reason was something other than Chairman's appearance as a witness.⁵ Contrary to the Trial Examiner, we find the Respondent's explanation of the discharge implausible.

Kende ordered Chairman's discharge on January 24, 1944, ostensibly because of a complaint lodged against Chairman by Personnel Manager Weintraub, to the effect that Chairman had been guilty of "gross insubordination" in an encounter with Weintraub in the plant on the night of December 30, more than 3 weeks before. Politzer, who was Chairman's immediate superior, and was himself responsible directly to Kende, opposed Weintraub's demand for the discharge. Kende nevertheless ruled peremptorily in Weintraub's favor, without questioning Chairman himself or otherwise independently investigating the December 30 incident. That episode itself was a heated argument between Weintraub and Chairman, precipitated by Weintraub's order that Chairman send home an employee whom Chairman had stationed on stand-by duty. The record shows that Weintraub's authority to give Chairman such an order was at least questionable. Moreover, whether or not Weintraub had this authority, the dispute ended with the two men shaking hands and agreeing to "forget" their differences. It was, at most, only a squabble between two supervisors, one of whom, Chairman, reasonably questioned the other's authority in the circumstances; it was not an instance of "gross insubordination" on Chairman's part.

During the next 3½ weeks, the Respondent neither reprimanded Chairman for his supposed impertinence to Weintraub, nor took any disciplinary action against him. Indeed, Politzer, when Chairman reported the affair to him on December 31, assured Chairman that it was Weintraub, rather than Chairman, who had been "out of order." The only testimony offered by

⁴ In finding that the conference of December 1 did not result in "any plan for Chairman's discharge," the Trial Examiner discounts the significance of that conference and Kende's motivation as revealed by it. We do not adopt the Trial Examiner's appraisal of this incident.

⁵ Cf. *Montgomery Ward Co. v. N. L. R. B.*, 107 F. 2d 555, 560 (C. C. A. 7).

the Respondent in explanation of the long delay between Chairman's alleged misconduct and his punishment, is that of Weintraub and Politzer to the effect that Politzer assured Weintraub, within a day or two after December 30, that Chairman intended to resign in about 10 days. The Respondent asserts that Weintraub thereupon lodged no complaint against Chairman until January 24 because he had in the meantime been expecting Chairman to leave, and only noticed, on or about January 24, that Chairman was still at work. The Trial Examiner believed this testimony, although he flatly discredited Politzer's statement, contradicted by Chairman, that Chairman had in fact agreed to resign, and although he also found both Weintraub and Politzer to be unreliable witnesses in many respects. We cannot accept the Trial Examiner's finding that Politzer, in effect, invented the story that Chairman intended to resign in order to appease Weintraub and gain time for Chairman, for this finding is irreconcilable with the other related facts, and all the other evidence bearing on Politzer's behavior and attitudes at that time.⁶ We find, then, that the record contains no credible explanation of Weintraub's failure to call for disciplinary action against Chairman, on account of their quarrel on December 30, until about a month after the event. We think that on this record, Weintraub's revival of the December 30 episode as a basis for demanding Chairman's discharge, and Kende's summary ruling on that demand, despite Politzer's opposition, are reasonably explained only by the other facts to which we previously adverted: the Respondent's extreme animus against Chairman because of his testimony at the Board hearing despite its prior warning, and its promptly conceived plan—which was initially frustrated, but not shown to have been abandoned—to find a pretext for discharging him.⁷ We find, on

⁶ There is also no plausible support for the Trial Examiner's conclusion that Weintraub "chose to make an issue" of the December 30 episode, which he had promised to "forget," "when he learned that Politzer was investigating his [Weintraub's] conduct." This finding, based on the testimony of Politzer, whom the Trial Examiner generally discredited, is in direct conflict with Weintraub's own testimony concerning his alleged conversations with Politzer at that time; and it is inconsistent with the testimony of Zicarelli, who was elsewhere specifically credited by the Trial Examiner where his testimony was in conflict with Weintraub's. Zicarelli, who had mediated between Weintraub and Chairman during the December 30 encounter, testified that when he spoke to Weintraub the next day, Weintraub assured him that the incident was "forgotten." Weintraub admitted the conversation, although he denied that this was what he said to Zicarelli.

⁷ The Trial Examiner found that there was insufficient "proof" to establish "an arrangement between Kende and Weintraub to penalize Chairman for testifying"; also that Weintraub's conduct on December 30, in his quarrel with Chairman, "was not actuated by reason of Chairman's pro-union testimony at the representation hearing." We agree that, for all that appears, Weintraub's animosity toward Chairman, exhibited during their apparently fortuitous encounter on December 30, was not specifically at-

the entire record, that Chairman was discharged for testifying at the Board hearing, in violation of Section 8 (4) of the Act. We therefore reverse Conclusion of Law No. 3 set forth in the Intermediate Report.

The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth above, occurring in connection with the operations of the Respondent described in the Intermediate Report, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

The Respondent contends that Chairman's position was abolished upon Chairman's discharge, and that for this reason no reinstatement can be ordered, even if the Board finds that the Respondent discharged Chairman in violation of the Act. The record, however, does not support the Respondent's contention. Chairman's position was neither abolished nor substantially modified after his discharge. Chairman was replaced by maintenance mechanic Sebia, who was upgraded and made foreman in charge of Chairman's shift. In his new position Sebia directed and supervised the work of his crew. He worked with his hands part of the time, and did not work on engineering plans. At the time of Chairman's discharge, the Respondent employed three assistant engineers, each of whom was in charge of a shift of maintenance mechanics. After Chairman's discharge, only Chairman's job was modified in name only while the duties of the other two assistant engineers remained substantially the same.*

tributable to Chairman's testimony at the Board hearing. It is also true that there is no direct evidence of an explicit understanding between Kende and Weintraub, subsequent to the conference on December 1, that Weintraub would either create the December 30 incident itself, or exploit that particular incident as the basis for Chairman's discharge. However, the absence of direct and detailed evidence of such a conspiracy, as the Trial Examiner suggests and finds unproved, does not militate against our conviction that it was actually because of Chairman's testimony at the Board hearing, and only ostensibly because of the resurrected December 30 episode, that Weintraub and Kende brought about Chairman's discharge. On the evidence before us, we have no substantial doubt that discrimination occurred; neither in this, nor in any similar case, is it necessary that we have positive proof blue-printing the method whereby that discrimination was planned and accomplished.

*Assistant Engineer Goldson testified that he is presently in charge of the crew of maintenance mechanics on the 7:30 a. m. to 4:30 p. m. shift and that he has a job equivalent to that of Chairman. Chief Engineer Kende testified that the scope of duties of the two maintenance engineers remained the same as Chairman's, after the latter discharge.

As it has been found that the Respondent discriminated against Chairman for having given testimony under the Act and thereby violated Section 8 (4) of the Act, we shall direct that the Respondent offer him immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights or privileges. We shall also order that the Respondent make Chairman whole for any loss of pay he may have suffered by reason of his discriminatory discharge by payment to him of a sum equal to the amount he would normally have earned as wages during the periods: from January 25, 1944, to the date of the Intermediate Report herein, and from the date of the Decision and Order herein to the date of the Respondent's offer of reinstatement, less his net earnings during the same periods.*

Because of the Respondent's unlawful conduct we are persuaded that, unless enjoined, danger of the commission by the Respondent in the future of like and related unfair labor practices is to be anticipated from the Respondent's conduct in the past. In order to effectuate the policies of the Act, we shall order the Respondent to cease and desist from discharging, or otherwise discriminating against any employee because he has filed charges or given testimony under the Act, or in any other manner interfering with the rights of employees to file and prosecute charges and to give testimony under the Act.

The Respondent contends that as a matter of law because supervisors are excluded from the coverage of the Act, as amended by the Labor Management Relations Act, 1947, it would not effectuate the policies of the Act to order the reinstatement of Chairman, who at the time of his discharge occupied a supervisory position, and that the Board, in any event, is powerless to remedy unfair labor practices engaged in by the Respondent prior to the amendment of the Act on August 22, 1947, which ceased to be such after the amendments. For the reasons set forth in our opinion in *Matter of Republic Steel Corporation (Upson Division)*,¹⁰ we find no merit in the Respondent's contention.

The Respondent also contends that the Board may not issue

* By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the Respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See *Matter of Crossett Lumber Company*, 8 N. L. R. B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See *Republic Steel Corporation v. N. L. R. B.*, 311 U. S. 7.

¹⁰ 77 N. L. R. B., No. 179; see also *Matter of Briggs Manufacturing Company*, 75 N. L. R. B. 563.

an order directing reinstatement and back pay for Chairman in view of the provision of Section 10 (c) of the Act, as amended, which precludes the Board from directing reinstatement, or back pay, for any employee who has been suspended for cause. We find no merit in the contention. Assuming that the provision has retroactive application to events that occurred prior to the effective date of the amendments to the Act, it is not applicable to the instant case, for Chairman's discharge, as we have found, was not "for cause," but for his having given testimony under the Act.¹¹

CONCLUSIONS OF LAW

1. International Brotherhood of Electrical Workers, Local #3, affiliated with American Federation of Labor, is a labor organization, within the meaning of Section 2 (5) of the Act.

2. By discharging Imre Chairman and failing to reinstate him because he had testified for International Brotherhood of Electrical Workers, Local #3, affiliated with American Federation of Labor at a representation hearing on November 30, 1943, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (4) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 8 (4) of the Act.¹²

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Universal Camera Corporation, New York City, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from discharging or otherwise discriminating against any employee because he has filed charges or given testimony under the Act, or in any other manner interfering with the right of employees to file and prosecute charges and to give testimony under the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer Imre Chairman immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges;

¹¹ Cf. *Matter of Westinghouse Electric Corporation*, 77 N. L. R. B., No. 171.

¹² The provisions of Section 8 (4) of the National Labor Relations Act, which the Board found were violated, are continued in Section 8 (a) (4) of the Act, as amended by the Labor Management Relations Act, 1947.

(b) Make Imre Chairman whole for any loss of pay he has suffered because of the Respondent's discrimination against him, by payment to him of a sum of money equal to the amount he would normally have earned as wages during the following periods: from January 25, 1944, to the date of the Intermediate Report herein, and from the date of the Decision and Order herein to the date of the Respondent's offer of reinstatement, less his net earnings during the same periods;

(c) Post at its plant in New York City, copies of the Notice attached hereto, marked "Appendix A."¹³ Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director of the Second Region in writing within ten (10) days from the date of this Order what steps the Respondent has taken to comply herewith.

Signed at Washington, D. C., this 31st day of August 1948.

[SEAL]

PAUL M. HERZOG,
Chairman,

ABE MURDOCK,
Member,

National Labor Relations Board.

JAMES J. REYNOLDS, Jr., dissenting:

I disagree with the conclusion of my colleagues that Imre Chairman was discriminatorily discharged by the respondent in violation of Section 8 (4) of the Act. I am of the opinion, shared in by the Trial Examiner, that the evidence does not sustain a finding that the violent altercation which took place on December 30, 1943, between Chairman and Weintraub, respondent's personnel director, was actuated by reason of Chairman's testimony at the prior representation hearing, or that Chief Engineer Kende's motive in sustaining Weintraub's demand that Chairman be dismissed was based upon anything other than his evaluation of Weintraub's request.

¹³ In the event that this Order is enforced by decree of a Circuit Court of Appeals, there shall be inserted before the words "A DECISION AND ORDER" the words "DECREE OF THE UNITED STATES CIRCUIT COURT OF APPEALS ENFORCING."

Accordingly, I would adopt the recommendation of the Trial Examiner that the complaint be dismissed in its entirety.

Signed at Washington, D. C., this 31st day of August 1948.

JAMES J. REYNOLDS, Jr.,
Member,
National Labor Relations Board.

"APPENDIX A"

NOTICE TO ALL EMPLOYEES

Pursuant to a decision and order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT DISCHARGE or otherwise discriminate against any employee because he has filed charges or given testimony under the Act.

WE WILL NOT in any other manner interfere with the right of our employees to file or prosecute charges and to give testimony under the National Labor Relations Act.

WE WILL OFFER to Imre Chairman immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed and make him whole for any loss of pay suffered as a result of the discrimination.

(Employer)

Dated----- By-----
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

UNITED STATES OF AMERICA
 BEFORE THE NATIONAL LABOR RELATIONS BOARD
 TRIAL EXAMINING DIVISION
 WASHINGTON, D. C.
 Case No. 2-C-5760

In the Matter of *UNIVERSAL CAMERA CORPORATION and IMRE*
 CHAIRMAN

Mr. Jerome I. Macht, for the Board.

Kaye, Scholer, Fierman & Hays, Esqs., New York, N. Y.,
 by Mr. Beryl H. Levy, for the respondent.

Mr. Imre Chairman, the charging party, in person.

Mr. John K. Lapham, New York, N. Y., for Local No. 3,
 International Brotherhood of Electrical Workers, A. F. L.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

Upon a charge duly filed by Imre Chairman, the National Labor Relations Board, herein called the Board, by the Regional Director for the Second Region (New York, New York), issued its complaint, dated October 2, 1946, against Universal Camera Corporation, New York, New York, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (4) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, together with notice of hearing thereon, were duly served upon the respondent, Imre Chairman, and Local No. 3, International Brotherhood of Electrical Workers, A. F. L., herein called the Union.

With respect to unfair labor practices, the complaint alleges in substance that the respondent discharged Imre Chairman on or about January 25, 1944, and failed and refused to reinstate him because he gave testimony under the Act. In its answer, dated October 22, 1946, the respondent admits the jurisdictional allegations set forth in the complaint and the discharge of Chairman, but denies the commission of any unfair labor

practices. The answer also alleges the affirmative defenses that (1) Chairman resigned, but reconsidered and that on discovering this fact the personnel manager ordered his discharge; (2) that the delay in issuing the complaint constitutes laches.

Pursuant to notice a hearing was held at New York, New York from October 28 through November 8, 1946, before the undersigned, Sidney L. Feiler, the Trial Examiner designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel. The discharge appeared in person. The Union appeared by a representative on the opening day of the hearing, but was not represented thereafter. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. During the hearing, counsel for the Board moved to amend the complaint by alleging an additional reason for the discharge; namely, that Chairman was discharged for assisting the Union and engaging in other concerted activities protected by the Act, said action being in violation of Section 8 (3) of the Act. The motion was denied. Counsel for the respondent moved to amend its answer as to the defense of laches to allege that the delay in issuing the complaint and the delay of Chairman in filing a charge constituted laches. The respondent also included in its motion to amend a new defense that Chairman's position had been abolished. The motion was granted. At the conclusion of the Board's case-in-chief, counsel for the respondent moved to dismiss the complaint. This motion was denied. After all the testimony had been presented, counsel for the Board moved to conform the pleadings to the proof as to formal matters. This motion was granted without objection. Counsel for the respondent then renewed the motion to dismiss the complaint and argument thereon was presented. Decision was reserved and said motion is disposed of by the findings, conclusions, and recommendations herein. Opportunity was then afforded the parties to file briefs and/or proposed findings of fact and conclusions of law. The respondent submitted a brief containing proposed findings and conclusions, which are disposed of hereinafter.

Upon the entire record in the case, and from his observation of the witnesses the undersigned makes the following:

FINDINGS OF FACT

II. THE BUSINESS OF THE RESPONDENT

The respondent is a Delaware corporation having its principal office and place of business in New York City, New York

where it has been and is engaged in the manufacture, sale and distribution of optical lenses, binocular and related products. During the year preceding the issuance of the complaint, the respondent purchased materials valued in excess of \$1,000,000, of which approximately 50 percent was transported to its plant in New York from points outside the State of New York. During the same period, the respondent manufactured at its plant in New York products valued in excess of \$1,000,000, of which approximately 50 percent was sold and transported to points outside the State of New York.

The respondent did not contest the jurisdiction of the Board and the undersigned finds that the respondent at all relevant times was and is engaged in commerce within the meaning of the Act.

II. THE ORGANIZATION INVOLVED

Local No. 3, International Brotherhood of Electrical Workers, affiliated with American Federation of Labor, is a labor organization admitting to membership employees of the respondent.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The defense of laches*

The respondent in its amended answer raised the defense of laches and relied on the alleged delays in Chairman's filing of a charge and the issuance of the complaint in this proceeding.

Chairman was discharged on January 25, 1944. On January 28, 1944, the Union filed a charge on his behalf alleging that he had been discharged in violation of Section 8 (1) and (4) of the Act. On January 25, 1945, the Union addressed a letter to counsel for the respondent notifying them that it had withdrawn the charge, as of that date. On February 3, 1945, Chairman filed a charge in his own behalf. On February 7, 1945, a Board Field Examiner addressed a letter to the respondent notifying it of the Union's withdrawal of the charge, the filing of a charge by Chairman, quoting material from it, and concluding with the statement that the examiner had recommended issuance of a complaint. The respondent also received a letter from the Regional Director, dated February 10, 1945, advising it that with his approval the Union's charge had been withdrawn, without prejudice. The complaint was subsequently issued on October 2, 1946.

The record of the filing of two charges afore-mentioned and the correspondence thereon shows that there was no delay in the presentation to the Board of the claim that Chairman was discriminatorily discharged. Later, when the Union withdrew

its charge, Chairman filed a charge on his own behalf within a week and the respondent was advised of the charge, the substance thereof, and of the intended recommendation that a complaint issue. It was not necessary that Chairman file the original charge and the undersigned finds that there was no laches in the presentation of Chairman's claim to the Board. Furthermore, the defense is not valid as to the lapse of time between the filing of the charges and the issuance of the complaint.¹

B. *The discharge of Imre Chairman*

1. Organizational activity among the maintenance mechanics: the representation proceeding

The general production employees at the respondent's plant had been represented by a union from March 1942. A group of maintenance mechanics sought membership in that union, but their applications were refused. In the fall of 1943, some of these employees joined the Union herein which filed a petition for an election and certification of representatives. A hearing on the petition was conducted commencing November 26, 1943. The Board, in its decision, directed that an election be conducted among the maintenance employees.² The Union was successful and thereafter entered into a contract with the respondent. Subsequent relations between the Union and the respondent have been satisfactory.

Imre Chairman took part in the representation proceedings and the events preceding it. He was employed by the respondent on August 22, 1943, in a supervisory capacity as an assistant or maintenance engineer and was placed in charge of the maintenance mechanics on the shift from 4 P. M. to midnight. At the time Chairman was hired the maintenance workers were actively discussing problems of self-organization.

Chairman was invited to and did appear at several meetings of these employees and gave advice and assistance. He also appeared at their request at the November 26 and November 30 sessions of the representation hearing. While the proceeding was nonadversary in nature the parties advanced opposing contentions and extensive testimony was adduced. These contentions were summarized by the Board in its decision, as follows:

¹ *N. L. R. B. v. Electric Vacuum Cleaner Co.*, 315 U. S. 685, reversing 120 F. 2d 611 (C. C. A. 6), setting aside 18 N. L. R. B. 591; *N. L. R. B. v. Berkshire Knitting Mills*, 121 F. 2d 235 (C. C. A. 3), remanding 17 N. L. R. B. 239; *Triplex Screw Co. v. N. L. R. B.*, 117 F. 2d 858 (C. C. A. 6), enforcing 25 N. L. R. B. 1126.

² *Matter of Universal Camera Corporation*, 54 N. L. R. B. 1037.

The I. B. E. W. [the Union herein] contends that all maintenance mechanics, maintenance mechanics' helpers, and carpenters, constitute an appropriate unit. The Company and Local 208 contend (1) that the employees in the I. B. E. W. unit are covered by the existing contract; and (2) that such employees do not constitute an appropriate unit because (a) they properly belong in an industrial unit, and (b) the I. B. E. W. unit encompasses two groups of maintenance employees, "optical" and "building" having nothing in common with each other.

Chairman attended the November 26 session of the representation hearing at the request of the maintenance mechanics, but did not testify. Chairman testified in the instant proceeding that after that session, but before the second session on November 30, he had a conversation with his immediate superior, Plant Engineer Benjamin Politzer, in which Politzer cautioned him that it would not do him any good to testify. Politzer denied making this statement, but his denial is not credited. During the same period Chairman spoke with Harry Goldson, an employee who had the same duties as Chairman and who supervised the shift prior to Chairman's. Goldson told Chairman that the respondent knew that Chairman was "with" the men and that if he testified it might not help him with the company.³ Despite the warnings he received, Chairman attended the November 30 session of the representation hearing and testified.

The transcript of the representation hearing shows that Chairman testified at length and in support of the Union's position as heretofore quoted from the decision of the Board. He testified during the morning session and also during the early part of the afternoon session which began at 1:45 p. m. Testimony was also given by three officials of the respondent, Vice President Jacob J. Shapiro, Chief Engineer George Kende [Politzer's immediate supervisor], and Politzer. Kende and Politzer testified that they attended the hearing on short notice and without prior preparation, but their testimony supported the position advanced by the respondent and differed substantially from Chairman's.

After he testified, Chairman went to the plant and began working on his regular shift. At about 7 p. m. he left the plant with Goldson for his dinner. They met Kende on the steps outside the plant and Kende and Chairman engaged in an

³ Goldson and Chairman were in substantial agreement as to the substance of this conversation. Goldson further testified that Politzer told him to pass that information on to Chairman and that it was meant as a friendly warning. This testimony is credited.

acrimonious exchange over the testimony that had been given at the hearing.⁴

In the course of the discussion Kende told Chairman that he had perjured himself.⁵ Chairman said that Kende was a liar and inquired whether Kende was a professional engineer and when Kende said he was not, Chairman told him that he was the ranking engineer at the plant and would support the men.

The next day Kende sent for Chairman's application for employment and also summoned Politzer to his office. Kende described his state of mind in the following language:

And I repeat, here is this man who had been with us only a few weeks, in a responsible position, in charge of one shift of maintenance mechanics, who seemed to be; I was quite certain of this, seemed to be either ignorant of the true facts regarding the organization within the company, responsibility of employees of supervisors or if that was not the case, then he was deliberately lying, not in one instance but in many instances, all afternoon.

I felt, therefore, that there was definite doubt regarding his suitability for a supervisory position of that nature.

Poltzer told Kende that Chairman's work was satisfactory. Then Personnel Manager Irving Weintraub arrived with Chairman's file and Kende proceeded to study the application for employment. Kende referred to a reference from an employee of a foreign language newspaper and said he thought that the newspaper was communistic. He also stated that he thought that Chairman was a communist. Weintraub replied that that made no difference. The conference concluded when Kende told Politzer to keep an eye on Chairman.⁶ A few days later

⁴ It is evident from the testimony of Chairman, Kende, and Goldson that the encounter was brief and very heated. The undersigned has not accepted the full testimony of any of these witnesses as to the incident, but bases his findings on an evaluation of the complete testimony.

⁵ There is a dispute among the witness as to whether Kende actually heard Chairman testify at the afternoon session. Chairman testified that he left the hearing room in midafternoon and met Politzer and Kende in the lobby of the building on their way to the hearing room, and that Politzer then introduced Chairman to Kende since they had not yet met. Kende testified that he and Politzer arrived at the hearing room at or near the start of the afternoon session and heard Chairman testify. Politzer had no clear recollection of when he got to the hearing or whether he saw Chairman on that day. The transcript of the hearing shows that Chairman testified shortly after the beginning of the afternoon session and that Kende and Politzer were the last two witnesses and testified much later. In addition, Kende was uncertain as to the identity of other witnesses who testified that afternoon. The undersigned credits Chairman's testimony.

⁶ The above description of the conference of Kende, Politzer, and Weintraub is based on their testimony which was in substantial agreement. Politzer and Kende differed as to whether Politzer had volunteered to keep

Politzer told Kende that he had checked with Goldson and had been told that Chairman was not a communist.

Word of the conference was relayed to Chairman. Barkins, an employee, told Chairman that Kende had asked for his application. Politzer told him that Kende was angry and wanted him to apologize and that he had better do so and that "they" were after his scalp and would try to get something on him to dismiss him. Politzer also told Goldson about his conference with Kende and Weintraub, said that he thought some method would be used to discharge Chairman and told Goldson to tell Chairman of it. Goldson did so.

2. The incident on December 30, 1943

On the night of December 30, 1943, Personnel Manager Irving Weintraub was at the plant and patrolled the various departments. His purpose in doing so, Weintraub testified, was to make sure that there was no slackening of work during the holiday season since the respondent was then engaged almost exclusively in war production.

During the evening Weintraub passed Frank Kollisch, a maintenance mechanic, several times and noticed that he was standing in the doorway of the mechanics' shop apparently doing nothing. Weintraub then took Kollisch to Chairman who was in Politzer's office. Weintraub told Chairman that he had

an eye on Chairman or whether Kende had suggested it. Kende and Weintraub differed as to whether Kende actually called Chairman a communist. However the general course of the conversation is clear.

Politzer testified in detail as to his state of mind during this period. He testified that the maintenance men spoke to him concerning their treatment and that some of them said that the company was not fair and that he agreed with them. He also stated that he felt resentment against the company because he was not consulted by top management concerning the men under his supervision. He further testified that prior to this hearing he had reconsidered his position and felt that he had been wrong in his attitude towards the company and that his feelings might have led him to color the truth in 1943 and 1944.

The testimony does show that at the time of the incidents herein Politzer was friendly with Chairman and did try to help him. It is undenied also, as appears later, that Politzer opposed Chairman's discharge. However, Politzer was uncertain and confused in his testimony. The undersigned found his testimony in many respects to be vague and unreliable.

As to his warning to Chairman, Politzer testified that he might have used language to the effect that the company was trying to "get" Chairman for testifying, but that he could not recall it. He denied that he was ever told this by any company official.

Chairman also testified that Goldson told him that he had overheard a conversation, between Kende and Vice President Shapiro to the effect that they would find a pretext to discharge him. Goldson denied this and his denial is credited. Goldson testified that he did tell Chairman that his testifying would not do him any good with the company and that he might have used Shapiro's name in that connection because, in his mind, Shapiro and the company were synonymous.

seen Kollisch loafing and wanted him sent home. Chairman said that Kollisch was standing by for emergency duty. When Weintraub insisted that Kollisch be sent home, Chairman said Politzer was his superior, that he would only take his orders from him, and refused to carry out Weintraub's order. After a further exchange of words during which, Chairman testified, Weintraub said he had power from the War Department to kill him, Chairman said to Weintraub, "if you are drunk, please go home and sleep it off." Weintraub then ordered Chairman to leave and the latter refused. Weintraub attempted without success to telephone a guard. He then rushed out of the office.

Weintraub returned in a short while with Al Salinsky, a uniformed guard, Joseph Zicarelli, a maintenance mechanic and shop steward for the Union, had heard some of the prior conversation between Chairman and Weintraub. He intervened when Salinsky entered Chairman's office and remonstrated with Chairman and Weintraub. He was able to get both men to agree to shake hands and forget the incident.

There is complete disagreement between the witnesses for the Board and the respondent as to what took place immediately thereafter. Zicarelli and Chairman testified that Weintraub and Salinsky left and that they completed their shifts without further incident. Chairman testified that he closed windows and locked things up because there would be no work the next two night shifts.⁹

Weintraub testified that after he had shaken hands with Chairman he started to leave and then heard Chairman again say that he was drunk. Then, Weintraub testified, he ordered Salinsky to put Chairman out of the plant and this order was carried out in spite of protestations from Zicarelli.¹⁰ Salinsky testified that he put Chairman out of the plant at Weintraub's order. Sam Pearl, foreman of the optical department shift, testified that he saw part of the aforementioned events from outside Chairman's office and that he saw Weintraub come up to the office with Salinsky and heard him say "there's your

⁹ Maintenance mechanics Joseph Morano and Ernest Werneburg testified that they were on the shift following Chairman's and that they worked the shift starting midnight December 30, 1943, and ending in the morning of December 31. The respondent also introduced in evidence a notice which had been posted notifying that shift that it would be paid in the morning of December 31.

¹⁰ John E. Kearns testified that he had investigated the charges herein while serving as Field Examiner for the Board. He testified that he talked with Weintraub with reference to obtaining Chairman's time card and that the latter had told him that Chairman had completed his shift on the night in question. However, he also testified that Weintraub said that Salinsky escorted Chairman from the building. All witnesses agreed that the incident occurred near the end of the shift.

man," and that a minute or two later he saw Salinsky come out with Chairman and Zicarelli and Weintraub following them.

Salinsky's version of the event of December 30 differed markedly from the testimony of Weintraub. Salinsky testified that he did not go to Chairman's office with Weintraub; Weintraub testified to the contrary. Salinsky could not recall Chairman and Weintraub shaking hands and the circumstances surrounding it; Weintraub and the witnesses for the Board were in substantial agreement on that point. The respondent contends that in spite of these divergencies, which it attributes to Salinsky's nervousness at the time of the incident, Salinsky and Weintraub were in agreement that Chairman was ejected from the plant and that this version was the correct one. However, the inconsistencies in the testimony of Salinsky and Weintraub cast doubt on the reliability of their testimony. On the other hand, the undersigned was impressed with Chairman's testimony as being a correct recital of events as they transpired. In important aspects, Chairman's testimony was corroborated by witnesses for the respondent. While the undersigned has not fully credited his version of certain conversations, the undersigned does credit his version of the events on the evening of December 30, 1943, as corroborated by Zicarelli and concludes that Chairman was not ejected from the plant.

3. Events between December 31, 1943 and January 24, 1944

The day after his encounter with Weintraub, Chairman spoke to Politzer. Chairman, according to his testimony herein, gave Politzer his version of the events of the previous evening, told Politzer that Weintraub had been drunk, and asked Politzer whether Weintraub could give him orders. Politzer, Chairman further testified, replied that Weintraub was acting "out of order" and said that he would see to it that Weintraub kept his promise to forget the incident. Politzer denied the substance of Chairman's testimony. He testified that Chairman had told him that Weintraub had had him put out of the plant and asked whether Weintraub could discharge him. Politzer, continuing his testimony, stated that he told Chairman that Weintraub did not have the right to discharge him and that he would support him. Politzer testified that he then questioned several employees, but could not obtain corroboration of Chairman's claim that Weintraub was drunk and reported this to Chairman later in the day. The undersigned credits Chairman's testimony especially since he continued working without interruption and concludes that he did not tell Politzer that he was ejected.

Politzer also spoke with Weintraub about the incident.

Weintraub testified that he saw Politzer the morning after the incident and started to tell Politzer about it, but Politzer said that he already knew of it, that Chairman was resigning and would leave in ten days or two weeks. Weintraub testified that he replied that that would be satisfactory, and that he would not press the matter, but that Politzer should make sure that Chairman left at that time.

Poltizer testified that he first spoke with Weintraub on the morning of the second work day after the incident and that the conversation was as follows:

He said, "I hear you have been investigating me as to whether I was drunk or not."

I said, "Yes."

He said, "You ought to know me better than that, that I don't drink. I was dead tired that night—the night of December 30—and I had been on my feet all day and this was late in the night and there was a lot of pressure on me and I was there under explicit order of Mr. Githens."

Q. Who is that?

A. Mr. Githens?

Q. Yes. Spell that.

A. G-i-t-h-e-n-s.

Q. Who is Mr. Githens?

A. The president of Universal Camera.

Q. Yes.

A. "You know damn well that I wouldn't drink under conditions like that. I was here to see that there was no drinking." This is Weintraub talking. "I was going to forget this whole matter with Imre but since he is raising the issue of drunkenness, I want him fired."

Poltizer further testified that he argued with Weintraub over this decision, but Weintraub was adamant. Continuing his testimony, Politzer stated that when he told Chairman of this conversation, Chairman said that the men were not backing him up and that he would quit in about ten days and submit his written resignation in a few days. Politzer then relayed this information by telephone to Weintraub who agreed to abide by the arrangement.

The testimony of Politzer as summarized above differed in important respects from that of Weintraub. The undersigned from his observation of the witnesses credits Politzer's version rather than Weintraub's as more in accord with the prior events. However, the undersigned rejects Politzer's testimony that Chairman said that he would resign. Chairman clearly felt that he was in the right in his argument with Weintraub. His

insistence on testifying in the representation hearing in spite of contrary advice and warnings from his associates indicates that he would not be swayed by the opinion of others when he had fixed ideas. In addition, although Politzer testified that Chairman agreed to submit a written resignation in a few days, there is no proof that he submitted one or was asked to submit one.

This is not to say that the subject of resignation was not discussed by Politzer and Chairman. According to Chairman's credited testimony, he had another conversation with Politzer around January 11 or 12, 1944, in which Politzer said that Weintraub was still angry and wanted to bring the incident up again and Politzer then asked whether Chairman would not consider resigning. Chairman refused.

Weintraub testified that on January 24, 1944, he first noticed that Chairman had not resigned within the prescribed time and asked Politzer why Chairman had not left.¹¹ Politzer replied that Chairman had changed his mind and would not resign. Weintraub insisted that Chairman leave, declaring that it would lower his prestige if he could be called "drunk" without any punishment. Then Politzer questioned Weintraub's authority to order Chairman's discharge. Politzer and Weintraub went to Kende, Politzer's superior, and told him of their dispute, including the surrounding circumstances. Kende upheld Weintraub. Politzer then returned to his office and filled out a termination slip for Chairman noting that he was discharged for "misconduct" and that the discharge was effective as of January 25.

On January 25 Chairman was stopped by a guard as he attempted to enter the plant and was sent to Weintraub's office. Weintraub told him that he was discharged for misconduct, but refused to give Chairman a written statement to that effect. Chairman then said, "For your misconduct, you fired me. So long." Chairman was then escorted to Politzer's office by Salinsky, the guard, and picked up his personal possessions. While there, he spoke with Politzer and the latter assured him that he had been satisfied with his work and did not want to discharge him.

CONCLUSIONS,

While there was a great deal of conflict among the witnesses as to the circumstances leading up to Chairman's discharge the

¹¹ The findings as to the events leading up to the decision to discharge Chairman are based on the testimony of Weintraub and Politzer primarily, and also the testimony of Kende and Chairman as to later developments. Weintraub and Politzer did not agree on important details and the findings are based upon a reconciliation of their testimony.

basic events are discernible. Chairman, shortly after his employment, interested himself in the efforts of the maintenance mechanics to secure union representation. He appeared at the representation hearing and gave testimony favorable to the position which a majority of those mechanics were advocating and which was opposed to the position taken by the respondent.

Chairman received warning's from Goldson and Politzer both before and after testifying that his conduct would bring him into disfavor with the respondent. However, Politzer, although Chairman's immediate superior, was clearly dealing with Chairman as an equal and was giving him his personal opinion meant as a friendly warning. Politzer supported and defended Chairman throughout his employment and while his recollection as to past events has not been fully credited there is no dispute as to his background fact. In any event, there is no proof that Politzer ever had any information or instruction from his superiors as to the respondent's attitude toward Chairman before his conference with Kende and Weintraub, on the day following the November 30 session of the representation hearing.

Kende was aroused by Chairman's testimony which differed from his own. He spoke to Chairman and the two had a violent quarrel. The next day Kende called for Chairman's application and reviewed it with Politzer and Weintraub. He was clearly very angry and dissatisfied with Chairman. However, Politzer said that Chairman's work was satisfactory and Weintraub brushed aside Kende's voiced belief that Chairman was a Communist. While Politzer felt after this conference that Chairman's position was in jeopardy, and told Chairman so, there is no proof that the conference resulted in any plan for Chairman's discharge.

Nothing happened after that conference for almost a month. Then Chairman and Weintraub had their encounter on the night of December 30. While the Board contended that Weintraub brought on the argument as part of a prearranged plan to effect Chairman's discharge, the facts and circumstances point to the opposite conclusion and indicate that the two principals had a violent and sudden clash of tempers. The undersigned deems it unnecessary to decide whether Weintraub was actually drunk, as Chairman claimed. Nor is it necessary to decide the precise scope of Weintraub's authority on the night of December 30, 1943.¹² Again, whether Weintraub was mor-

¹² Chairman knew Weintraub as the personnel manager. However, the scope of Weintraub's authority had never been delimited, as Politzer indicated in his own testimony.

ally justified in acting as he did is beside the point. The undersigned concludes that his conduct that night was not actuated by reason of Chairman's pro-Union testimony at the representation hearing.

The exact sequence of events thereafter is not very clear chiefly because Politzer, who occupied the key position and was in a position to know the stands taken by Weintraub and Chairman, gave testimony which the undersigned found was not wholly reliable.

Although Chairman and Politzer discussed the question of resignation, the undersigned is convinced that Chairman did not tell Politzer that he would resign. However, Politzer did tell Weintraub that Chairman was resigning. Whether he was motivated therein by an honest mistake or by the thought that the quarrel between Weintraub and Chairman might be soon forgotten if action was delayed, is not clear. On January 24, Weintraub insisted on the termination of Chairman's employment and was upheld by Kende.

The Board contended that the incident of December 30 had been settled amicably by Chairman and Weintraub and that it had been revived several weeks later and used as a pretext for Chairman's discharge when the actual reason was that he had testified at the representation hearing. Chairman and Weintraub had shaken hands on December 30, but the credited testimony indicates that Weintraub did not dismiss the incident from his mind, but chose to make an issue of it when he learned that Politzer was investigating his conduct. Chairman also testified that about the middle of January Politzer told him that Weintraub was making a personal issue of the dispute.

After considering the entire testimony, the undersigned is not persuaded that the allegation of Chairman's discriminatory discharge has been established. The contention of the Board that Kende and Weintraub entered into some arrangement to discharge Chairman on a pretext has little basis in the actual testimony and rests principally on surmise. Kende had shown animus toward Chairman after his encounter with Chairman on November 30, but there is not sufficient proof to establish an arrangement between Kende and Weintraub to penalize Chairman for testifying. A final consideration is Kende's motive in upholding Weintraub's demand that Chairman be discharged. In view of all the facts and circumstances the undersigned is not persuaded that Kende based his decision on any animus towards Chairman for testifying rather than on an evaluation of Weintraub's request based upon its merits. It will therefore be recommended that the complaint be dismissed.

Upon the basis of the foregoing findings of fact¹³ and upon the entire record in the case, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The operations of the respondent, Universal Camera Corporation, constitute trade, traffic, and commerce among the several States, within the meaning of Section 2 (6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local No. 3, affiliated with American Federation of Labor, is a labor organization, within the meaning of Section 2 (5) of the Act.

3. The respondent has not engaged in unfair labor practices, within the meaning of Section 8 (1) and (4) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, the undersigned recommends that the complaint against Universal Camera Corporation, New York, New York, be dismissed.

As provided in Section 203.39 of the Rules and Regulations of the National Labor Relations Board, Series 4, effective September 11, 1946, any party or counsel for the Board may, within fifteen (15) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.38 of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof; and any party or counsel for the Board may, within the same period, file an original and four copies of a brief in support of the Intermediate Report. Immediately upon the filing of such statement of exceptions and/or briefs, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.65. As further provided in said Section 203.39, should any party desire permission to

¹³ The respondent submitted four proposed findings of fact. Of these, items 1 and 2 are accepted, item 3 is rejected, and it is unnecessary to rule on item 4 in view of the findings herein. Respondent submitted a proposed conclusion of law and this has been accepted.

argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to ~~the Board~~.

Sidney L. Feiler,
SIDNEY L. FEILER,
Trial Examiner.

Dated: February 18, 1947.

[1] BEFORE THE NATIONAL LABOR RELATIONS BOARD

SECOND REGION

Case No. 2-C-5760

In the Matter of UNIVERSAL CAMERA CORPORATION and IMRE
CHAIRMAN

120 WALL STREET,
NEW YORK, NEW YORK,
Monday, October 28, 1946.

Met, pursuant to notice, at 10: 00 o'clock a. m.

Before SIDNEY L. FEILER, Trial Examiner.

[2] Appearances: Jerome I. Macht, Esq, 120 Wall Street, New York, N. Y., appearing for the National Labor Relations Board. Kaye, Scholer, Fierman & Hays, 149 Broadway, New York, New York, by Beryl Harold Levy, appearing for the Universal Camera Corporation. John K. Lapham, 130 East 25th Street, New York, New York, appearing for the International Brotherhood of Electrical Workers, Local 3.

[4] PROCEEDINGS

* * *

[8] Mr. MACHT. I should like to have the papers marked for identification as "1 through A, B, C," and right on down.

(Documents above referred to were marked "Board's Exhibits 1, 1-A, 1-B, 1-C, 1-D, 1-E, 1-F, 1-G, 1-H, 1-J, 1-K" for identification.)

Mr. MACHT. At this time, I offer in evidence as Board's Exhibits 1, the original charge filed in the matter of Universal Camera Corporation, Case No. 2-C-5410, filed January 28, 1944.

The original charge, filed in the matter of Universal Camera Corporation, case No. 2-5760 on February 3, 1945, by Imre Chairman, the employee involved herein.

A copy of the letter to Universal Camera Corporation dated February 7, 1945, from the Fourth Regional Office as Board's Exhibit 1-B.

The complaint, case No. 2-C-5760, Board's Exhibit 1-C.

The notice of hearing, 1-D.

[9] Copy of the charge 1-E.

Affidavit of service together with registered receipts, 1-F.

Respondent's answer, 1-G.

Affidavit contained in the answer, 1-H.

Notice of change of place of hearing, 1-J.

Affidavit for the service thereof, 1-K.

Trial Examiner FEILER. Is there any objection?

Mr. LEVY. I have none.

Trial Examiner FEILER. Is there any objection on the part of the union?

Mr. LAPHAM. I have no objection.

Trial Examiner FEILER. There being no objections, Board's Exhibits 1 through 1-K are received in evidence.

(Documents heretofore marked "Board's Exhibits 1 through 1-K" for identification received in evidence).

* * *

[29] FRANK KOLLISCH (Board witness).

* * *

DIRECT EXAMINATION

* * *

Q. What was your job there in December of 1943?—A. Maintenance mechanic.

* * *

[30] Q. December 30, 1943, were you at the plant at that time?—A. That is correct.

Q. Do you recall having any conversation with Mr. Weintraub of the company?—A. I did; very little, though.

Q. Will you please tell us in your own words just what your duties were that night, where you were and what happened.—A. Well, Mr. Chairman, the engineer that was in charge at [31] that particular time, put me on watch on that night. I don't know if he expected trouble or what. He told me that my place was in the shop, if there was nothing else to do, and that is where I happened to have my conversation with Mr. Weintraub right outside the door of the shop.

Q. What were you doing at your place?—A. Nothing.

Q. What were you doing?—A. I was doing nothing when Weintraub came along.

Q. Nothing?—A. Yes; I was doing nothing. I was put there to wait for something to occur.

* * *

[33] Q. Tell us what you were doing on the night of December 30, 1943.—A. I was out on a couple of jobs. I had

completed that and it seemed every time Weintraub did pass, I was standing in the doorway. We got a room—at that particular time we had a room about, say, half the size of this room, and [34] it was kind of warm in there, so I was standing out in the doorway and every time Weintraub passed, I beckoned him and I said, "Hello," and he seemed to be rushing down that night. I didn't make it my business to find out why he was rushing up and down. He passed me quite a number of times. It was around 9:15 that he started his rounds racing up and down the hall.

Around 10:10, if I am not mistaken, the girls had gone on their rest period and everybody seemed to be happy. It was the day before New Year's Eve and they were having a heck of a good time. They were on their own time, as they considered it, and if anybody talks to you, naturally you will talk back to them. So this was going on and along comes Weintraub, and naturally he seen me standing there and he figured I had been doing nothing long enough.

He says to me to come on and we will go up to the front.

"Who is in charge?"

I said, "Mr. Chairman."

So he hauls me off. I am leading him, and all of a sudden, when we are about at the inspection room, he passes me and barges into the engineer's office.

Mr. Chairman was sitting down, and I don't know if he was reading the Sunday papers or not. He was busy and [35] Weintraub comes in—boom! and he says, "I want this man sent home."

So Chairman is busy yet.

"I want this man sent home."

So Mr. Chairman, I guess he must have heard him by then, gets up and says, "Why? I am the engineer in charge."

I guess he must have figured he could determine if I should be sent home or not.

• • •

[36] Q. Do I understand correctly that your duties were to be available for call?—A. That is correct

Q. And you were to be there and if anything went wrong you were to go there where something had gone wrong?—A. That is right.

Q. And when it wasn't wrong, you were to wait there until Mr. Chairman came with a slip to you to send you to fix things?—A. That is correct.

Q. That was your job, wasn't it?—A. That is right.

Q. And that is what you were doing when Mr. Weintraub

came and you were there waiting; is that correct?—A. That is right.

. . .

Q. Now, come to the conversation.—A. He said that he wanted me sent home.

[37] Q. Did he give any explanation?—A. Yes; that I was doing nothing and Chairman said that he knows what I was doing and if I was doing nothing he knew it and I was doing nothing at all. I was waiting there for him to give me a job if anything did occur.

Q. Did Mr. Chairman tell Mr. Weintraub that?—A. That is right.

Q. What did Mr. Weintraub say about that?—A. Weintraub didn't want to listen to no explanations, and what he supposedly—

. . .

Trial Examiner FEILER. Just a moment, we are getting into cross-exchanges.

Suppose you just tell us what Weintraub and Chairman said to each other at that time.

[38] The WITNESS. Weintraub said that he wanted this man sent home. Chairman said that he knew what I was doing.

Trial Examiner FEILER. What did Weintraub say to that, if anything? What did Weintraub reply when Chairman said that he knew what you were doing?

The WITNESS. He didn't want to hear anything.

. . .

[47] Q. Would you please state who became your supervisor when Mr. Chairman's employment was severed?—[48] A. Sebia; Nicholas Sebia.

Q. Did he have the same type of job over you as Mr. Chairman did?—A. Well, he had supervisory capacity, but he also worked at the job.

Q. Will you clarify that for me?—A. Well, as Mr. Chairman was considered an engineer, Mr. Chairman directed the jobs, and Nicholas Sebia helped do the jobs.

Q. And he also directed the jobs, too?—A. That is right.

Q. Now, how long did Mr. Sebia remain your supervisor?—A. Until the time that I left the place.

. . .

[56] JOHN K. LAPHAM (Respondent's witness).

. . .

[57] Direct examination by Mr. LEVY:

Q. Mr. Lapham, you are the business agent for the A. F. L.

Local No. 3?⁸—A. The International Brotherhood of Electrical Workers No. 3; yes.

* * *

[58] Q. And in November 1943, when there were hearings before this Board, your union was the petitioner?—A. That is true.

Q. That was in a question to determine which of two unions represented the maintenance workers?—A. Yes; that is right.

* * *

Q. And subsequently, your union was recognized by the company and entered into a collective bargaining agreement?—A. Yes, that is right; it was certified by the Board.

Q. Do you have a collective bargaining agreement with the company at the present time?—A. Yes; we have.

* * *

Q. Would you say that in your opinion the labor relations [59] between your union and this company are good labor relations?

* * *

A. Yes; they have been fair.

* * *

Q. And your relations with Mr. Weintraub were what?—A. We have gone along all right on union questions.

* * *

[109] IMRE CHAIRMAN (Board witness).

* * *

DIRECT EXAMINATION

* * *

Q. How long were you employed?—A. I was employed from August 22, 1943 until January 25, 1944.

Q. Would you tell us briefly what was your job and your duties?—A. I was maintenance engineer on the 4-to-12 shift and I had to keep the machines and everything running while [110] the production work was in full swing.

Q. Would you clarify what you mean by, you had to keep the machines running?—A. I had a maintenance crew of maintenance mechanics and if a machine broke down, if lights went out, or power was cut off, I had to see that the men right away corrected the situation, and the machine operators could go on operating the machines, and produce.

* * *

Q. Do I understand that you were the supervisor in charge of this maintenance crew?—A. Yes.

- [111] Q. Who was your superior?—A. Mr. Ben Politzer.
 Q. What was his position?—A. Plant engineer.
 Q. Whom did you receive orders from?—A. Mr. Politzer.
 Q. From anyone else?—A. No.
 Q. He was your immediate boss?—A. Yes.

* * *

[112] Q. Would you explain that to the Examiner?—A. The production had to be kept up under all circumstances, and fuses of lights or power were in different parts of the building, so that when a fuse blew out on the fifth floor, for instance, I had to send a man immediately down to the second floor to exchange the fuses. Sometimes they could not find it. If they did not have a recollection where that particular part of the trunk was going, they could not find it, and they had to exchange faulty parts in different rooms of the fifth floor. On special occasions—we did not want to have any accidents or tragedy, and we had to have a man who was immediately obtainable to correct the situation so that the factory was not in darkness. That is one man's job who had to be posted on call in the maintenance shop.

Q. On the night of December 30, 1943, whom did you have posted in such a job?—A. I had posted Frank Kollisch.

* * *

[113] Q. In the early part of November of 1943, did you have a conversation with Mr. Politzer concerning your joining that Union?—A. I had.

* * *

[114] Q. A few days after that conversation, did you have a talk with Mr. Joe Zicarelli?—A. I had.

Q. Who is Mr. Joe Zicarelli?—A. Joe Zicarelli was the organizer of the union.

Q. Would you tell us briefly where that conversation was, and what he said and what you said concerning the union?—A. It was in the maintenance shop and Zicarelli said that for two years they could not get their representation, and they want to have a union, and he really does not know how to start or what to do, whether I would help him.

I told him that the Wagner Act is the law of the land. They are entitled to do it, and outside the plant I will help him and tell him how he can go about it, so that he gets his representation.

Q. Did you say just what he should do, if anything, concerning the National Labor Relations Board under the Wagner Act?—A. Yes.

Q. What?—A. I told him to apply here, ask for the hearing, and then they will get their representation.

• • •

[115] Q. Was anything said about filing a petition for a hearing?—A. Yes.

[116] Q. Just tell us what you recall.—A. I told Mr. Zicarelli that he has to get the forms and fill them out and bring them in, and ask Mr. Kearns that he should see to it that they have a hearing here. Mr. Kearns then informed us that Mr. Hickey has the case all ready, and then Zicarelli asked Mr. Hickey to speed up the whole thing because they are waiting for two years and never got to first base.

• • •

Q. You came with Mr. Zicarelli to the National Labor Relations Board several times; is that correct?—A. Yes.

Q. Do you recall that a hearing was held on the petition that you have referred to before Mr. Hickey as a Trial [117] Examiner commencing on November 26, 1943?—A. Yes, I do.

Q. Did you attend that first day of the hearing, November 26, 1943?—A. I did.

Q. Would you please tell us who asked you to come down?—A. The men in general asked me to help them and come down and testify.

Q. Was that Mr. Zicarelli or some of the other men?—A. All of them.

Q. Did you come down to testify in behalf of the International Brotherhood of Electrical Workers, Local No. 3?—A. Yes.

Q. And when you got down to the hearing, what did you do?—A. I testified.

Q. No; the first day, November 26, 1943.—A. The first day I sat with the men and then we were sent back because it was postponed.

Q. Were the company officials or the management sitting with the men like you, or were they sitting in a different part of the hearing room?—A. They were sitting in a different part.

Q. And did you sit with the employees and the union [118] organizers?—A. Yes.

Q. As I understand from your testimony, the hearing was postponed and then you left the hearing room; is that correct?—A. Yes.

Q. Do you recall that the second day of the hearing was on November 30, 1943?—A. Yes, sir.

Q. Were you asked by the men and the union organizers to come down and give your testimony on that day, too?—A.

Yes; also by Mr. Lapham and Mr. Stern, the attorney for the union.

. . .

Q. In between the time of the hearing—the first hearing, namely, November 26, and November 30, did Mr. Ben Politzer, your supervisor, have a talk with you about your coming down here to testify?—A. Yes.

Q. How long was it after that first day; about how many [119] days after November 26, when the hearing was postponed, would you say?—A. I think it was on the 27th, the next day.

. . .

A. Mr. Politzer said that the company heard I was down to testify, and unless I don't want to be in bad graces with the company, I should not go down.

. . .

Q. What else, if anything, did Mr. Politzer say about the fact that you should not come down to testify, at that time?—A. He just said it would not do me any good.

. . .

Q. What did you say about that?

[120] A. I said the men have a just case. So I go down and I help them as much as I can because they have been for two years without any help from anyone.

Q. What else did you tell him?—A. That as about the whole conversation.

Q. Do you recall whether you referred to the Wagner Act as a law, or what was said, if anything, about that?—A. Yes; I said that it is the law of the land. There is nothing that I would be afraid of if I proceed lawfully.

Q. This is when he told you you would be in bad graces with the company if you testified?—A. Yes.

. . .

By Mr. MACHT:

Q. What do you recall Mr. Politzer saying about your being in bad graces if you testified?—A. If I don't want to be in bad graces with the company, I should not come down.

Q. About a day after you had that talk with Mr. Politzer, did you have a talk with Mr. Harry Goldson? I believe he is in the hearing room here.—A. Yes.

. . .

[121] By Mr. MACHT:

Q. What job did Mr. Harry Goldson have [122] at the plant at that time?—A. Harry Goldson was the engineer for the day shift of the maintenance crew.

Q. Was his job similar to yours?—A. Yes.

Q. The main difference being that you were on the four to twelve shift, is it?—A. Yes.

Q. What did Mr. Goldson tell you, if anything, concerning your testifying at the hearing?

The WITNESS. Mr. Goldson told me that now they know that I am with the men.

Mr. LEVY. That what?

The WITNESS. That I am with the men, and I should watch my step.

By Mr. MACHT:

Q. What did he say concerning your testifying at the coming hearing?—A. That it might not help me with the company.

Q. What did you say to Mr. Goldson concerning that?—A. I told Mr. Goldson I think this is the right thing to do, and I am not afraid of anyone, and I will help the men because they have a just cause.

[126] Q. Did you come down to the hearing of November 30th, anyway?—A. I did.

Q. Was that the case of Universal Camera Corporation, 2-R-4242, and I show you a copy of the transcript and ask you if that will refresh your recollection as to the number of the case?—A. Yes; I remember the case.

Q. Were you subpoenaed down here, or just how did you happen to come down the second time?—A. The men asked me to come down and help them. That is why I came, voluntarily.

Q. Help them by doing what?—Q. By testifying to the truth that they are maintenance mechanics and not production workers.

Q. Well, did you so testify at the hearing?—[127] A. Yes.

Q. Was your testimony contradicted by Mr. Kende's—strike that, please. Was your testimony contradicted by anyone from management?

[128] The WITNESS. By Mr. Fierman, Mr. Shapiro, and Mr. Kende.

By Mr. MACHT:

Q. Who was Mr. Fierman?—A. Mr. Fierman, I understand, is a partner and a lawyer for the firm.

[129] By Mr. MACLETT:

Q. Who was the next man?—A. Mr. Shapiro, the vice president of the company.

Q. Who is Mr. Kende? Will you give his full name?—A. Mr. Kende—I don't know his full name.

Q. What was he then?—A. He was the chief engineer.

Q. Where did he fit in the hierarchy of management, can you tell us?—A. He was the immediate superior of Mr. Ben Politzer.

[133] Q. That afternoon, on the same day that you had testified, did you return to your work at the plant?—A. Yes.

Q. About what time was that?—A. I would say—I was there 3:30.

Q. Well, did Mr. Kende have a talk with you that very afternoon after you had gotten back to work?—A. Yes.

Q. How long had you been working; about what time was it when he spoke with you?—A. Around 7 o'clock I left the plant and outside, on the staircase which leads to the plant, Mr. Kende came and he yelled at me: "You and your men perjure yourselves. [134] The company does not expect you to go down there and testify against them. The company expects you to work here."

So I said, "I did not perjure myself, and the men did not perjure themselves, either."

"If you accuse me, just a minute. Are you a licensed professional engineer?"

He said, "No." I said, "I am, and I am the ranking engineer, and now I want to tell you that these men had the right and it was upheld by the law, and just like in the Army I was sticking up for my men, I do it here the same way. You could have done something for the men."

So Mr. Kende said, "Well, I wanted to do it but I was always obstructed, so I could not do anything."

And I said, "The day you will do something, I will lift my hat to you," and then I left.

Q. Did he refer to any particular part of your testimony in which he claimed that you perjured yourself?—A. Yes; he said that I did not tell the truth when I qualified the men as maintenance mechanics because they worked all over the plant and they also worked in another building for the same company on maintenance work which was at 16th Street and 6th Avenue. He said that is not true.

[135] Trial Examiner FEILER. Go ahead.

The WITNESS. I said it is all on the reports. We made out reports every night and work was going on for weeks already, and every day I wrote out my reports. One was kept for the company, one went to Mr. Kende, and one was left in our office.

Mr. Politzer read it. He knew it, and so Mr. Kende had knowledge of it, but to qualify these men as production workers at the machine and not give them the pay which they are entitled to as maintenance mechanics, they wanted to distort the truth in this way, and then came the accusation that I was perjuring.

* * *

[137] By Mr. MACHT:

Q. Did you have a conversation again with Mr. Politzer, your immediate supervisor, shortly after that talk that Mr. Kende gave you?—A. Yes, I had.

Q. How long afterwards was it?—A. The next day.

* * *

[138] Q. What did you say to him and what did he say to you?—A. Then Politzer came in and said, "Imre, Kennedy wants you to apologize, and you better do it or else they are after your scalp."

I said, "Ben, if I am right, I never apologize, and in this case I am right, because if a man dares to accuse me of perjury, then he has to prove it, there is no apology coming to him, and I will never apologize. He should [139] apologize to me for what he said."

So Ben said to me, "Now, here are two hot-headed Hungarians. Neither one wants to give in."

Q. What did he want you to apologize to Kende for?—A. For the way I behaved on the stairs, and I told him I am not taking this perjury accusation because I told the truth.

* * *

[141] Q. Was anything said by Mr. Politzer concerning your application form or record at the company?—A. That was the next day, not on this day, that Barkins took the application because he said Kende asked for your application. He wants to find something criminal on it, and the next day, Mr. Politzer told me that they are scanning [142] my application, whether I did not make any statement, because Kende wants to have something criminal on me, and he says I am subservice, and they tried to get my scalp.

* * *

[144] Trial Examiner FEILER. Then, what was next?

The WITNESS. Then Politzer talked to me that I should

apologize to Kende, and then next day Mr. Politzer again told me that on account of my going down to give testimony, they are after my scalp.

Trial Examiner FEILER. Thank you. I think that straightens it out for counsel.

By Mr. MACHT:

Q. At this time that Mr. Politzer asked you to apologize to Mr. Kende, would you state whether or not, when Kende had accused you of perjury, you had accused him of testifying falsely, and said that it was not you, after he had so accused you?

[145] Q. After your last conversation with Mr. Politzer, did you have a further conversation at the plant with Mr. Harry Goldson who is here in the room?—A. Yes.

Q. Would you tell us where it was and what Mr. Goldson said to you and what you said to him?—A. It was a couple of days after the hearing, and we were busy outside, the north side of the office where the factory kept the different accessories for the machines.

We had to open those closets, and as Mr. Goldson gave me the keys and I opened up those closets, we were standing there, and it was not my starting time yet.

So Harry said to me, "Imre, you better watch out. If you have anything which is not all right with you, you better resign and don't fight them because otherwise, you know that Kende has all the reports in, and your application blank, and they want to see if they can get rid of you."

* * *

By Mr. MACHT:

[156] Q. I refer you to the night of December [157] 30, 1943; were you working at the plant?—A. I was.

Q. Did you have an employee by the name of Frank Kollisch, who worked under your supervision?—A. He was one of the mechanics in my shift.

* * *

Q. Tell us what, as best you recall, his assignment was that evening?—A. Around eight o'clock I assigned him to drilling pipes and after he was finished with it I put him on emergency calls that he had to stay in or around the shop, and if something happens, that he can be sent right away to correct the situation.

It was a whole day—it was a holiday spirit and people were kind of happy and we had to see to it that no accident or tragedy happened that night. If, as in the past, some lights go out where the power is cut off from the machines, they had to go right away and see where the fuses are located and exchange

them so that the employees in the factory can see and are not jeopardized by darkness or any other incident.

* * *

[158] Q. Just tell us in your own words what happened from the time Mr. Weintraub entered the office in which you were sitting and how he entered.—A. It was around eleven o'clock when I was sitting at the desk working and Weintraub came in with Frank Kollisch and in a quite loud voice said, "I caught this man four times talking to the girls. He is not working since eight o'clock. Fire him. Send him home."

So I said, "Maybe I can clear up this mistake. He was drilling pipes and then when he was through I told him to stay there and if I need a man for some emergency that I can have him immediately and see that any kind of an incident is corrected."

He says, "I saw him. He was speaking to the girls. He annoys the girls when they pass by and they laugh and they wish Happy New Year to each other. What is this? Send him home."

So I said, "Mr. Politzer is our superior. You can tell him in the morning and if Mr. Politzer will then say [159] that the man has to be discharged, he will be discharged, but I need the man here and we have to see that when everybody goes the whole floor is locked up securely and that no accidents happen."

"I don't care; Politzer is not the boss. I am the boss," said Weintraub. He said, "I am the boss."

I said, "I didn't know. This is the first time I hear about it."

Well, he said, "I have such powers from the War Department that if I want to, I can kill you and the War Department is going to back me up."

I said, "If you are drunk, please go home and sleep it off."

He said, "What? Pick up your coat, get out; you are fired."

I said, "That is not the way to talk to an engineer. And, furthermore, you can only eject me from the factory if I had done something criminal, and I didn't do anything which is against any regulation. I just see that I stick to my duty and that no accidents happen. You see, the people are happy. They don't care what is going on and you want to promote an accident."

He said, "All right, I will show you."

And then I said, "There is the telephone."

He said, "I will call the guards," and he went to [160] the telephone and fumbled around and he fumbled with that telephone and for twenty minutes he tried to get the guard's number which was known to every one in the factory. It was easily dialed any time. I myself did it when there was a black-out,

and immediately, I called up the guard and had the black-out; but he couldn't find it and then he pushed down the telephone—receiver and telephone, separately—and then he ran out.

As he run out, I just heard that he said, "I am not drunk. Hey, shop steward, am I drunk?" And then there was further talk outside the office.

Q. What was the next thing that happened?—A. Then I went back to my work because Mr. Politzer gave me a task to describe the function of a machine which was a little bit intricate and while I was working on that report for Mr. Politzer, he came back with the guard, Al—I don't know his other name, maybe Shapiro, because he is a relative of Mr. Shapiro—and Al said, "I have to take you outside."

I said, "Look here, I cannot be arrested because I didn't do anything. If you arrest me and you throw me out, you do that on your responsibility and on the company's responsibility. You know I have to stay here to safely see out the people and to safely lock everything so that when we leave for two days, the factory is not going to work, [161] and everything is in ship-shape."

He said, "Well, you see, I am very sorry, but even in Weintraub's condition, I have to take his orders so I have to take you out."

Then Zicarelli came in and asked Al to come on outside, and then they were talking about the whole case. Then Zicarelli came back and said, "Imre, will you please reconsider, if they put you out. We will lose your help, so see that you make up with Weintraub."

I said, "All right, call Weintraub in."

So Zicarelli went out and called Weintraub back into the office to me and then he said, "This is a holiday and there is holiday spirit and you don't act like two school boys but shake hands and let us forget the whole thing."

Trial Examiner FEILER. Can you tell me who said that?

The WITNESS. Zicarelli.

Trial Examiner FEILER. All right, go ahead.

A. (Continuing.) So Weintraub said he is willing and we shook hands and Weintraub said then, "Well, I acted kind of harsh and I shouldn't have done that, so let us forget it." After we shook hands, Al, the guard, came over and said, "I am really glad that I didn't have to put you out because, after all I don't like such assignments. I am glad you stayed here."

So I sat down, I finished my work there; and then, [162] at the regular time, when I saw that the man closed everything, turned out the lights, I went with them downstairs. I punched out my card at the regular time and then I went home.

Q. When you shook hands with Mr. Weintraub, did you say anything to Mr. Weintraub at that time?—A. I said, "I am sorry, too."

Q. And what did Mr. Weintraub say, if anything?—A. He said, "Well, I acted very harsh but now let us forget it."

* * *

[167] Q. From whom did you receive your instructions and supervision?—A. From Ben Politzer, the plant engineer. He was my superior.

* * *

Q. Did you return to the plant, the day following, December 30, 1943?—[168] A. Yes.

Q. Did you see Mr. Politzer?—A. Yes.

Q. Tell us where you saw him and what was said. Did you have a conversation with Mr. Politzer?—A. I did.

Q. Tell us where and what you did say to Mr. Politzer and what did Mr. Politzer say to you.—A. I came into the office, and later, when Mr. Politzer came in, I stood up and went over to his desk and I told him what happened the night before. After I related the whole thing, I said, "Is Weintraub our superior because he said that he can just give orders and he gave orders to you and you are not a real head here but he is?"

So Mr. Politzer said, "Well, Weintraub is talking through his hat. You are right. I am the boss here and Weintraub has nothing to say."

And then I told him Weintraub was drunk and several people on the floor told me before that, and that is why I kept out of his way altogether. And then he said, "Who told you that?"

So I said, "The girl, Helen, from the block inspection; who was out drinking with him, and then Sauker, and Sam Pearl." So then he asked Sam Pearl to come down.

* * *

[172] Q. Getting back to the conversation which you have been describing with Mr. Politzer the day following the incident with Mr. Weintraub, did Mr. Politzer say he would do anything?—A. He said he is going to go downstairs and talk to Weintraub because he wants to see that such things should not happen again, that his authority in the maintenance room is superior, and should not be abused by Weintraub.

Q. Was anything said between you and Mr. Politzer concerning whether or not the matter was to be forgotten?—A. I told Mr. Politzer that after we shook hands, it was agreed that let us forget it. The whole incident is forgotten, and he said he will see to it that Weintraub keeps to it.

—Q. Was anything said concerning whether or not you acted

correctly in not firing Kollisch?—A. Mr. Politzer said he is the boss and he has the right to fire. So Weintraub was acting absolutely out of order.

Q. Let me pick you up on that. Did Mr. Politzer say that [173] or is that your conclusion?—A. He said that.

Q. He said that during this conversation?—A. "Weintraub was absolutely out of order, and I am the boss, not Weintraub, and he has nothing to talk in our department."

* * *

Q. Could you tell us about what part of January 1944 it would be that you had another conversation with Mr. Politzer?—A. It might have been the 11th or 12th of January.

Q. Where was this conversation and what did Mr. Politzer say to you and what did you say to him?—A. It was again in the office of Mr. Politzer, and he said that Weintraub is acting funny, and he does not under-[174]stand, but he is so mad personally that he wants to bring up this question again.

Q. What did you say to him?—A. I told him that I know that they want to do something because I helped the men and testified for them, that then, I never quit under fire and I will see it through to the end.

Q. What gave rise to your saying that?—A. Mr. Politzer kind of asked whether I would not consider to resign, and I said no.

* * *

[175] By Mr. MACHT:

Q. At this time, would you please state whether or not you informed Mr. Politzer you would quit or resign?—A. I did not.

* * *

Q. Specifically, did you ever inform Mr. Politzer or anyone from management that you would quit or resign?—A. I did not.

* * *

[176] Q. Would you please tell us in your own words what took place on that day, where it happened and what was said.—

[177] A. At the usual time in the afternoon of January 25, 1944, I went to the factory to take up my duties. At the door a guard stopped me and said I can't go up to my office. I must see Mr. Weintraub.

So I went to Weintraub's office and I had to wait there for an hour, and then Weintraub opened the door and said, "Come in." I went in and he said, "You are fired."

I asked, "May I know why?"

He said, "For misconduct."

I said, "Do you want me to give this in writing?"

Q

He said, "No; nothing in writing."

So I said, "For your misconduct, you fired me. So long." And I went out.

I wanted to go back to the office to pick up my private possessions and take them home. So another guard stopped me and said, "You can't go in."

I said, "I have my things upstairs and I want to take them home."

So he called for Weintraub and Weintraub came out and said he is going to have, he is going to give me a guard, and under his surveillance can I only go up to the office to get my private possessions. Again he called Al, the guard, and instructed him to take me upstairs, and after I gathered my belongings, to put me outside the factory.

[178] So Al came with me to the elevator. He went up to the fifth floor. He came with me into the office and then he stayed there for a while and was waiting around in and outside the office until I was through. Mr. Politzer was there in the office when I came and I told him that I was fired and I was just picking up my things and then I go home.

Mr. Politzer said, "I was arguing with them all day, and I did not fire you and I don't want to fire you. I was satisfied with your services, but they insist that they want to fire you and I cannot do anything against it."

Then he greeted me in Hungarian when I left, and then I went downstairs.

Outside the factory, Sol Forte met me and said I should wait because the men want to talk to Weintraub that he should not fire me and they even want to go on strike if they fire me. Then he went back and talked to the men, and when he came down again, I told him that he should get the idea of a strike out of his head and tell the others the same thing because we have a war on and they have to see that the war production goes on and help the war effort. My little private affair has nothing to do with the winning of the war. I can take care of that later.

So then they thought better of it, there would be no [179] strike, and still some of them wanted to go to talk to Weintraub, and I heard the next day that Zicarelli, the shop steward, saw Weintraub, Kende, and Shapiro.

* * *

[180]

CROSS-EXAMINATION

* * *

[234] Q. Mr. Chairman, I understood you to say in response to a question that Mr. Macht asked you, that all of the men

asked you to come down to testify in the previous hearing, in the previous hearing that took place in 1943.—A. Yes.

Q. Would you tell us which men asked you to come down and testify?—A. The maintenance mechanics.

* * *

*[236] Q. Did Mr. Lapham ask you to testify?—A. Yes, he did. In fact, he asked several times many favors, and when they did not want to let him go into the plant, he asked that I should talk to someone so that he could go in; and these men ejected him from the factory because they did not want to have this union, or they did not want to have these maintenance mechanics to be in a union. They wanted to have them in the C. I. O. union where they said they are production workers and belong to, but a certain labor leader Homer did not take them in, and that is why they were left in the cold for two years, and no one would help them. Everyone bucked them and pushed them aside, and they hardly could get a nickel raise, and then when they saw that I was willing to help them, they all asked me for it.

Q. These hearings that were held in around November 1943 [237] in this proceeding in which you testified, what did you understand was the nature of that proceeding, Mr. Chairman?—A. The nature of the proceeding was very clear. Mr. Shapiro and Mr. Kende wanted to make understand the Board that there is one department which is the Optical and these men are production workers under 65 cents an hour, and they have to join the C. I. O. union which has a contract. These men were maintenance mechanics on a scale of \$1.35 to \$1.50. They wanted to have their own union, their own representation, because they were excluded from the C. I. O., and the C. I. O., to get a contract, simply dropped these men and left them out in the cold.

Now, when they had the right to be represented, they did not know how to go about it, and they did not understand that as long as the company tells the National Labor Relations Board that they are production workers, they will be pushed out, and they have to stay as production workers with 65 cents or whatever they were paid at the time, but if the maintenance mechanics as such are accepted, then they have to get a higher pay and they can have their own union as they were thrown out of the C. I. O. union.

Now, Mr. Shapiro always maintained that they cannot have another union. They must go in and Mr. Kende said there is only one department, that is the Optical [238] department because they only work there and they do not do anything else.

Then their theory was exploded when I came in and I said, "Yes, they are mechanics. They are not production workers. They are not working at the machine grinding the lenses. They keep up the machines. They are well skilled people. They are making those machines move, repair them and they keep up this building, all the way through and all the floors, and also in another building where they set up a new shop, so that they work all around."

That was the issue and that is how it was solved.

Q. You understood—A. They had for two years no hearing, and just when a letter not telling the truth came down to the Board, that was about all. They did not know why they could not get to first base, and when I told them that I have to come down here, dig out the papers, show the Board they are mistreated, show the Board that they don't tell them the truth, they have the other side of the story, and then they have a hearing and they have a contract and then they up to now get \$1.42 an hour, and they are actually maintenance mechanics, recognized as they were, when they were working, and they wanted to push them into the production workers.

[239] Q. You understood that the company had told the Board that these men were production workers?—A. It is in the record.

* * *

[246] Q. Local 3?—A. Yes. And then they said, "All right, we will help you people along." And then, Zicarelli didn't know how to start the whole thing. He asked me to come around with him to Lapham. Lapham was very busy. He didn't want to bother with the men then, and we had to convince him. Then the company didn't want him to admit to the plant so that he could talk to anyone. In my presence once, he called up Mr. Shapiro. He couldn't get a connection. He didn't want to talk to him. He wanted him to stay out of the company, stay out from the union organization entirely. So the man didn't know what to do.

That was the second year which went by and they still were nowhere.

* * *

[306] Q. Would you state under what auspices those meetings were called, if you know?—[307] A. All the men called the meeting and they were all present. And they wanted to have some action and they didn't know how to go about it, so they needed advice and they asked me for it. And I gave it to them and I helped them to find the proper authorities who will take their claims up and see that their rights are restored.

Q. Were you present at each of those meetings?—A. Mostly all of them.

Q. How many did you attend?—A. Four or six.

• • •

[356] HARRY GOLDSON (Board witness).

DIRECT EXAMINATION

• • •

[357] Mr. LEVY. I should like to amend paragraph 4 to the answer so that it will read as follows: I have one copy here and the others are being sworn to and I will have them available just as soon as I can.

Trial Examiner FEILER. Why don't you offer that copy so that we might have it in evidence and, later on, move to substitute the other copies and let it be handled in that way so that we can at least have your motion in writing?

Mr. LEVY. Surely. Do you want me to submit this [373] as an exhibit?

Trial Examiner FEILER. Yes. Let us have it marked as "Respondent's Exhibit 5" for identification.

(Document above referred to was marked "Respondent's Exhibit 5" for identification.)

• • •

[398] Q. Just keep that until later [handing document back to the witness]. How long have you been employed by the Universal Camera Corporation?—A. Since January of 1942.

Q. Have you been there the whole time or has your employment been interrupted?—A. No. I went away. I entered the Navy in March of 1944 and I resumed my duties with the company in February of 1946.

• • •

[399] Q. Before you entered the service would you tell us briefly what was your job at the company?—A. My job at the company was as the assistant—well, I don't exactly recall what the title was at the time. I think Mr. Politzer was the Plant Engineer. I was one of his assistants working on the eight to four shift in charge of the maintenance crew at that time.

Our duties were to maintain optical machinery and to set up that machinery, to repair it when it broke down and in some cases build some of that machinery.

Also, we had to take care of—

Q. Will you tell us what your job was?

• • •

[406] By Mr. MACHT:

Q. Mr. Goldson, what shift are you now working on?—A. I am now working on the 7:30 to the 4:30 shift.

Q. Have you ever worked on the four to twelve shift?—A. No; I haven't.

Q. Is there anyone there who is working on the four to twelve shift?—A. Yes; there is.

Q. Who is that?—A. Mr. Best.

Q. How do you spell that?—A. B-e-s-t.

Q. And his job is substantially the same as yours?—A. Yes; it is.

Q. Were you familiar with the job of Imre Chairman when he was employed by the company?—A. Yes; I was.

Q. Would you tell us whether or not your job was similar or different than that of Imre Chairman's when he was employed by the Company?—A. Mr. Chairman had the equivalent job that I had except that he was on the four to twelve shift.

• • •

[409] Q. Do you recall that there was a hearing involving certain of the employees of the plant that was held before the National Labor Relations Board in November of 1943?—A. I do.

Q. Do you recall having any conversation with Mr. Ben Politzer concerning any witnesses coming down to that hearing?—

A. Well, I don't remember if it was prior to the first hearing or in between the first and second hearing, but Mr. Politzer told me to tell Mr. Chairman that it wouldn't do him any good with the company if he went down to testify.

It was done more or less as a friendly warning since Mr. Politzer was friendly with his assistants.

• • •

Q. After Mr. Politzer told you that did you convey that information to Mr. Chairman?—A. I did.

Q. Would you tell us as best as you can recall what you told Mr. Chairman?—[410] A. Well, I don't recall the exact words, but I told Mr. Chairman to the effect what Mr. Politzer had told me that it wouldn't do him any good to testify.

Q. Did Mr. Politzer state whether or not the company wanted Mr. Chairman to testify?—A. Well, he did make the statement that it wouldn't do Mr. Chairman any good with the company if he did testify.

• • •

Q. After the hearing which was held before the Examiner—

Mr. MACHT. When I refer to the hearing I am referring to the hearing in case 2-R-4242, Mr. Examiner.

Q. (Continuing.) Did Mr. Politzer have a further conversation with you concerning Mr. Chairman?—A. Yes; he did.

Q. Would you please tell us what that conversation was and just what was said to you and what you said to him?—A. The conversation was held somewhere in the shop. There were several conversations either in the shop or in the office. It was after the time that Mr. Chairman had a little battle with Mr. Kende and Mr. Politzer told me to tell Mr. Chairman to apologize to Mr. Kende otherwise the company would try [411] to get something on him and so bring about his discharge.

* * *

Q. What, if anything, did Mr. Politzer tell you they were doing?—A. Mr. Politzer told me that they were going over his record; I think that the record was being brought in Mr. Kende's office so he could look at it too.

Q. Did he tell you the purpose of going over that record?—A. Yes, he did.

Q. Tell us what he said.—A. As he had told me before the purpose of looking into Mr. Chairman's background was to see if they could get anything [412] on him for the purpose of getting him out of the company. That is, if he didn't apologize to Mr. Kende.

* * *

Q. Yes. Well, tell us what Mr. Politzer said.—A. I think that—I can't quote the exact words, but I think that Mr. Politzer said that Mr. Kende thinks "that Imre is a Communist" and that they are going to look into his application sheet or use some other means of going back into his background and see if they could ascertain that fact and use that to discharge him from the company.

* * *

[413] Q. Can you tell us what you said to Mr. Chairman concerning that?—A. Well, Mr. Chairman and I used to have conversations every afternoon. That is, when I used to come in to work I used to relay—I mean, when he came in to work I used to relay all of the information that had gone on in my shift and about some of the machines that had broken down and, of course, in those conversations we used to talk about the day's proceedings and, of course, all this that Mr. Politzer told me was conveyed to Mr. Chairman in that fashion.

In the course of those conversations I must have spoken to Mr. Chairman about the matter.

* * *

[417] Q. Were you present at any conversation between Mr. Politzer and Mr. Chairman concerning these matters?—A. Yes; I think I was.

Q. Would you please tell us what you heard said and what was said at that conversation?—A. Mr. Politzer told Mr. Chairman to apologize to Mr. Kende. If not the company would try to get something on him and see what could be done so as to bring about his dismissal.

Q. What do you recall Mr. Chairman saying, if anything?—A. Mr. Chairman said something to the effect that he was going to see the thing through.

. . .

[418] By Mr. MACHT:

Q. Could you tell us where that conversation took place and about when?—A. It took place—the conversation took place in the maintenance office. I don't remember the dates. It was after the second hearing.

Q. Was it before Chairman was discharged?—A. Yes.

Q. Will you tell us about how long that was before he was discharged?—A. Several weeks.

. . .

[420] Q. Just tell us what you heard Mr. Kende say to Mr. Chairman and what Mr. Chairman, if anything, said to Mr. Kende.—A. Well, when Mr. Chairman and Mr. Kende met on the staircase Mr. Kende told Mr. Chairman that he had perjured himself at the hearing and called him a liar.

Mr. Chairman said something to the effect that "if you call me a liar you are a liar." Then there was an exchange of words. I think they started to question each other's abilities as engineers, but since as I said before I was not in a position to question—I mean, since I was in the position of an employee of the company and he was a man who was supposed to be my superior it was a little bit embarrassing and I kept away from them.

. . .

[422]

CROSS-EXAMINATION

. . .

[458] By Mr. LEVY:

Q. Mr. Chairman said you told him before he came down to testify that the company knows he is with the men. Do you remember making such a statement to Mr. Chairman?—A. I can't recall the exact words of any statements I made to Mr. Chairman.

Q. Did you make a statement to that effect to Mr. Chairman?—A. I can't recall the exact words I used in any conversation with Mr. Chairman at that time.

Trial Examiner FEILER. Counsel is asking you if you said anything to that effect to Mr. Chairman, that is, in substance.

The WITNESS. Very possibly I did. I repeat that the entire trend of the conversation was along that line.

* * *

[466] JOSEPH EUGENE ZICARELLI (Board witness).

* * *

DIRECT-EXAMINATION

* * *

[467] Q. When you were employed by the company would you tell us briefly what was the classification of your job?—A. I was shop steward of maintenance.

Q. That was for the union, as far as the union was concerned. Now, I am asking you for the company.—A. I was maintenance mechanic.

* * *

[468] By Mr. MACHT:

Q. Were you working over at the company's plant on the night of December 30, 1943?—A. I was, sir.

Q. On that night did you have any conversation with Mr. Weintraub of the company?—A. I did.

* * *

[469] By Mr. MACHT:

Q. Would you please tell us what Mr. Weintraub said to you and what you said to him, if anything?—A. "Hey, shop steward," he said, "come here. I passed through the hallway and I saw Mr. Kalish standing in the doorway arguing or flirting with the girls. I took Frank Kalish into Mr. Chairman's office to have Mr. Chairman fire him and Mr. Chairman doubts my authority to do so."

Q. What did you say to him, if anything, at that time?—A. Well, I went into Mr. Chairman's office, that is, Mr. Politzer's office where Mr. Chairman was.

Q. Did Mr. Weintraub stay outside or did he also go into the office with you?—A. He came in, too.

Q. Did Mr. Weintraub do any further talking in your presence?—A. Yes. There was quite a bit of talking in my presence.

Q. What did he say?—A. He said, "I have the right to fire any man if I see him not working. I have a right—the Navy and the Army give me the right to go on any floor and if I find anyone not working I have the right to fire them."

Q. What else did he say about the Army and the Navy giving him authority?—A. He said, "I can also slap a man." Well, he was a little excited at the time. He said, "I can kill a man if I want [470] to." He said, "I can slap a man if it needs be."

Q. After he made those remarks that you have just referred to "I can slap a man" and "I can kill a man" did Mr. Chairman make any remark?

• • •

A. Mr. Chairman said, "Is that you or the alcohol talking?"

• • •

[471] Q. Did Mr. Weintraub say anything further?—A. Mr. Weintraub says, "Get your hat and coat, you are fired. I will show you what happens when you went and called me drunk." Then Mr. Chairman said something.

Q. What was said by Mr. Chairman?—A. Mr. Chairman said, "I am the engineer on this shift. I am doing a good job." and in reference to Frank Kalisch he said, "I am in authority on this floor. My men are doing a good job and I won't fire Frank Kalisch."

That was the import of it and Mr. Weintraub inferred that he felt his authority was being questioned.

• • •

Trial Examiner FEILER. Try to give it in sequence who talked and the substance or the direct words, if you remember.

• • •

[472] The WITNESS: Mr. Chairman said, "I am the engineer on this shift. I see to it that my men are doing a good job. Frank Kalisch has a right to be standing in the doorway and he has a right to be doing exactly what he was doing."—That was the import of that conversation.

By Mr. MACHT:

Q. What, if anything, did Mr. Weintraub say or do then?—

A. Well, Mr. Weintraub said, "Get your hat and coat. You are fired. I will show if anyone will say I am drunk." Then he was very angry and he went to the telephone and he tried to dial for the guard. I understood that he was attempting to dial for the guard.

Q. When you say "Attempting to dial for the guard" will you clarify that, please?—A. Well, he fumbled around with the

telephone. He didn't seem to get exactly the numbers that he wanted to and he left in a huff and went out.

* * *

Q. Did Mr. Weintraub later return?—A. Yes; Mr. Weintraub later did return.

Q. Was he by himself or did he have anyone with him?—A. No. He had the guard with him, guard Al Shlassman or Shlossman, I don't know.

* * *

Q. Tell us what they did and what they said.—A. Oh, I think this time he said, "Chairman, get your hat and coat and go home," and that he was going to have Mr. Chairman put out. I mean, have him escorted out.

Q. Did the guard make any statement?—[474] A. Well, the guard made a statement to me. In essence he said, "Mr. Weintraub has been drinking and I think he is drunk. I hate to do this, I hate to be compelled to do this, but you know how it is."

In the meantime, I butted in and said, "I am interested in Mr. Chairman. I recognize you represent the U. S. Government in this matter, but this man is going to go out over my dead body because I feel he is an engineer and was being treated in a very unjust and discourteous manner."

I felt Mr. Weintraub was overstepping his authority by having Mr. Chairman fire Frank Kalish and I felt—

* * *

[475] By Mr. MACHT:

Q. Did you have a further talk with Mr. Weintraub either in the office or outside of the office at that time?—A. Yes.

Q. Tell us what that was.—A. I said to Chairman and I said to Mr. Weintraub—

Q. Which one did you talk to first?—A. I talked to both of them. I was talking quite loud. I said, "You guys are acting like a bunch of kids. You are making a mountain out of a molehill. This is the holiday season and you guys out to cut it out. You are acting like a bunch of kids."

Q. What, if anything, did Mr. Chairman and Mr. Weintraub say?—A. Well, they didn't say anything, but by this time Mr. Chairman was in his office. He was in his office and Mr. Weintraub was out in the hall. I was like in the doorway [476] and I said—I went over to Mr. Weintraub and I said, "Listen, this thing is getting out of hand. I want this whole thing forgotten because I am interested in Mr. Chairman." I have a right to say what I think—

* * *

The WITNESS. I said to Mr. Weintraub, "You guys are acting just like a bunch of kids. I am going to go to Mr. Chairman and see if we can forget about the whole thing" and I went to Mr. Chairman and I said, "I just spoke to Mr. Weintraub. I want you fellows to forget this incident."

Then I said to Mr. Chairman, "I am going to bring over Mr. Weintraub to shake hands with you and I want you when he [477] comes in not to sort of renege on shaking hands with him because I am interested that it be amicably settled."

That was my interest. And, I said to Mr. Weintraub—I mean, I said to Mr. Chairman, "Mr. Chairman, we are interested in you. You helped us in the union and I don't want no trouble here." So Mr. Chairman said, "Well, all right bring him in." And, I went out to Mr. Weintraub and I said, "I spoke to Mr. Chairman and he is willing to shake hands and forget about the whole thing and I want you to shake hands too."

Then I brought them in and we were right near the doorway and as Mr. Weintraub came into the room I said, "Now, you fellows shake hands" and so that none of them be embarrassed I put my hands over their hands and I said, "You understand, you fellows are shaking hands like gentlemen. You are forgetting the whole incident" and Mr. Weintraub said, "I forgot" and Mr. Chairman said, "I forgot it."

So, I felt it was a nice job. I figured that hot incident was amicably settled.

By Mr. MACHT:

Q. Then after both said that what, if anything, happened?—

A. Well, see when I first got wind of this was when Mr. Weintraub said, "Hey, shop steward" I was walking toward the emery room. That was around eleven o'clock or eleven ten [478] o'clock and I was going to close the emery windows. You know it was like a holiday, like New Year's day or so; before New Year's on the 30th and Mr. Chairman and Mr. Weintraub must have been arguing in a loud voice when I went by. Then when I settled the trouble, this trouble with them then I had to go back to my duty of still closing the emery room because I had devoted my time that I had to close the windows settling this discussion between Mr. Weintraub and Mr. Chairman.

Q. When did you leave the plant that night?—A. Oh, I think at the regular time, 12:30.

Q. Were you still present at Mr. Politzer's office when a guard or Mr. Weintraub left?—A. Was I present at the office when the guard left?

Q. Yes.—A. Yes; I was present. I think the guard Al said to me—I mean he sort of congratulated me and he said, "I am glad the thing is over" or words to that effect. Words to the effect "I am glad that the situation resolved itself in a nice way."

Q. Would you state whether or not the guard left by himself or with anyone?—A. I think he left with Mr. Weintraub or he may have left by himself because I went about my business. You see, I [479] was worried about closing those emery windows and I had already devoted quite a bit of time to the excitement of these men and as soon as they shook hands and said they were forgetting the incident I felt I better go about my business.

Q. As you returned to work at the plant the next day did you see Mr. Weintraub?—A. Yes.

* * *

Trial Examiner FEILER. Just tell us what you said.

The WITNESS. I went in to Mr. Weintraub and I spoke to Mr. Weintraub. I said, "You fellows shook hands yesterday but I really want to know because I am shop steward because I am interested in Mr. Chairman is this really forgotten?" and Mr. Weintraub says, "Yes; it is forgotten" and I said, [480] I mean he said, "Joe, the Army and Navy gives me permission to slap a man's face if I want to." I didn't say anything. He said, "I got authority to fire any man." He gave me the impression he was in full command and he could fire a man and I made no comment on that.

* * *

Q. Did Mr. Chairman also work after that incident for the company?—A. Yes. He worked quite a while, for about a month or so.

* * *

[481]

CROSS-EXAMINATION

* * *

[492] Q. Listen, Mr. Zicarelli. How did the thing end up?—A. The thing ended up, they shook hands.

Q. What happened after that?—A. They said it was all forgotten.

Q. What happened after that?—A. Then I went around to the emery room and closed the windows, which is what I originally started to do.

Q. And what did Mr. Chairman do?—A. I think he sat at his desk. That is all he did.

Q. Do you know what he did?—A. Do I know what he did?

I am in the emery room closing [493] windows; do I know what Mr. Chairman did?

Trial Examiner FEILER. When you left that particular spot, were Chairman and Al and Mr. Weintraub still there?

The WITNESS. No; I don't think so. I think Mr. Chairman, when I left, I think he left Al and Weintraub in the hallway, and I left Chairman sitting at his desk, and I went to the emery room. I don't think they stayed together, even though they shook hands.

* * *

[544] GEORGE KENDE (Respondent's witness).

DIRECT EXAMINATION

* * *

Q. Were you chief engineer in January 1944?—A. I was.

Q. And in November 1943?—A. Yes.

* * *

Q. And the same in 1944?—A. No; at that time, in addition to being chief engineer I was also optical plant manager.

[547] Q. Give us your closest recollection if you will, Mr. Kende.—A. I said to him, "Look. I heard your testimony this afternoon and I believe it to be wrong in a number of respects." I wanted to go into the matter with him.

Q. Don't tell us what you wanted to do. Just tell us what you did.—A. He interrupted me as I was about to explain the details of what I thought he said in his testimony, and he started shouting at me claiming, very closely to this effect, "You are an engineer! You are an engineer." I am now quoting him.

"You are chief engineer of the company. You ought to stick with the men. You ought to stick up for the workers. You ought to stick up for other engineers; not [548] stick up for the company." That was the gist of his remarks.

I could see he was not going to enter into a reasonable discussion on the truth or error of his statements, and I was about to go my way when he said, "Just a minute. Are you a professional engineer?"

I said, "No; I am not."

"Well, you have no right to talk to me like that." I am quoting.

By this time I was a little way ahead of him on the staircase going up and I turned around to him and I told him that I believe he perjured himself at the hearing.

To that as I proceeded to enter the plant the last words I heard him say were, "Well, Mr. Shapiro lied on the stand."

That was the end of our conversation.

Q. You heard part of Mr. Chairman's testimony?—A. Yes.

Q. Did that differ from your own testimony?—A. Yes; very materially.

Q. And you thought Mr. Chairman was wrong?—A. I did.

[561] A. And I repeat, here is this man who had been with us only a few weeks, in a responsible position, in charge of one shift of maintenance mechanics, who seemed to be; I was quite certain of this, seemed to be either ignorant of the true facts regarding the organization within the company, responsibility of employees of supervisors or if that was not the case, then he was deliberately lying, not in one instance but in many instances, all afternoon.

I felt, therefore, that there was definite doubt regarding his suitability for a supervisory position of that nature.

I intended to investigate that doubt, and if possible get rid of the doubt.

Q. Did you do anything further about it the next day?—A. The next work day; yes.

[562] Q. Will you tell us what you did?—A. I asked Mr. Politzer to come into the office and I asked him to tell me what he knew about this Mr. Chairman.

Q. Who is Mr. Politzer?—A. Mr. Politzer is and was plant engineer in charge of optical plant maintenance. He was Mr. Chairman's immediate supervisor.

Q. And what was your relation to Mr. Politzer?—A. Mr. Politzer was directly responsible to me.

Q. Continue please.—A. Politzer explained that the man was a new man. Mr. Chairman was a new man in our organization which I had already found out.

I asked him about the man's work and he said it was fairly satisfactory. Naturally, he had been there only a few weeks, and it was not conclusive, but up to that point, he explained that his work seemed fairly satisfactory.

Q. Did you have any further discussion with Mr. Politzer?—A. Yes; I believe I asked him to wait in the office until I had the personal records brought into my office because I intended to check into the things that I just mentioned in two ways, first by questioning the man's immediate supervisor, Mr. Politzer, and then also by [563] looking at such data regarding previous employment and so forth as I usually furnished on our applications for employment.

Q. Which you were led to do as a result of what you heard him testify, and your discussion with him on the staircase?—
A. Yes.

* * *

[564] Q. Yes.—A. We waited for Weintraub to come in with the personnel records.

I looked up the application form and I noted and remarked that there were no business references whatsoever, no references from former employers of any kind.

There were, however, two personal references. Inquiries were sent out to three and two replies were received of a personal reference nature.

I commented on the fact that there were no references from any previous employers. This seemed strange to me.

Q. Mr. Kende, I am perfectly willing to have you go on and tell exactly what happened, in your own words, but would you try to stay as far as possible on the issue that concerns us as to what you discussed with Mr. Politzer and Mr. Weintraub concerning Mr. Chairman and his qualifications and your concern about them. We do not have to go into it in such a minute detail, Mr. Kende.—A. I examined the application form. I had nothing further to say to Politzer except perhaps I did ask him whether he hired the man or not, and he said, "No, Mr.—[565] I then turned to Weintraub and I said, "I believe this man is a communist."

Q. What did Mr. Weintraub say?—A. Mr. Weintraub got very excited and he said, "That has nothing to do with it." "We will hire Communists if we please."

Q. What occurred then, Mr. Kende?—A. There was a letter of reference.

Q. Was there any further discussion?—A. Yes; there was a letter of reference in there from a newspaper which I believed to be a Communist newspaper. I remarked on that to Weintraub.

* * *

Q. You have told us that. Was that the end of the [566] discussion?—A. That was the end of the discussion. I concluded by asking Mr. Politzer to keep an eye on the man's work.

Q. Mr. Politzer told you the man's work was satisfactory?—
A. Yes.

* * *

[577] Mr. LEVY. Examiner, in view of counsel's last statement which I most respectfully submit is contrary to the evidence which the Examiner will perceive upon examination of the record, I wish to refer to that portion of my examination of this witness when I sought to inquire into the statements

which Mr. Chairman made in that representation proceeding, which this witness thought were contrary to the facts.

Now, I desisted from pursuing that matter further on the Examiner's suggestion that he did not wish to retry those issues. I pointed out at that time that we are here at a very crucial portion of our case and that a distinction must be made between discharging a man or inquiring into a man's record because he gave testimony under the Act and inquiry into a man's record because he gave certain testimony which was contrary to the facts and which [578] you, as a scientific and mechanical expert in the plant, thought was contrary to the facts, believed was contrary to the facts, assert was contrary to the facts, and which raises a question in your mind concerning that employee's competence.

That is a very critical point with respect to this witness' testimony, and I thought we had been perfectly clear about it. Now, if we are not, I want to clear it up at this time.

Trial Examiner FEILER. It is a question of the veracity of this witness as to his motives for certain acts and conduct, and that is part of the agreement between you people.

The record of the 1943 proceeding is something that I told you I would consult and be guided accordingly. I do not want to go into it at this time.

Mr. LEVY. All right. I am content to take that assurance, sir.

* * *

[585] Q. Skipping to the month of January 1944, did Mr. Weintraub or Mr. Politzer discuss with you the matter of the resignation or discharge of Mr. Chairman?

* * *

The WITNESS. They both came to my office on one occasion.

Q. Yes, and what occurred, Mr. Kende?—[586] A. This was some time late in January. They explained—I don't know whether Politzer or Weintraub—explained—

* * *

A. (Continuing.) Weintraub or Politzer said—I do not recall whether it was Weintraub or Politzer who said—that an incident took place between Weintraub and Chairman at or about New Year's Eve, which was two or three weeks previous to this time, which incident has been testified to by several witnesses.

* * *

Trial Examiner FEILER. Let us go back to the original question and have a full answer. I think you will take care of what both counsel want [587] if you will tell us in detail the sub-

stance of that conversation. Give us the whole conversation in full.—A. Yes, sir. I will try to.

I have already stated that I do not know whether Weintraub or Politzer were the tellers of the incident. At any rate, they represented that Weintraub and Chairman had an altercation on New Year's Eve or the night before, I forget which, at which time Weintraub requested Chairman to send home one of the maintenance mechanics, specifically, a man called Kollisch, whom Weintraub found loitering in the hallway and molesting female employees in the optical department during working hours, and on repeated occasions, throughout the evening of that night. Kollisch was responsible for his work to Chairman.

* * *

Q. When they came into your office, did they tell you why they came?—A. Yes; it soon developed why they came.

Q. Did they tell you?—A. Yes.

Q. Why did they tell you?—A. Because there was a difference of opinion as to Weintraub's authority.

* * *

[590] Trial Examiner FEILER. Let us go back and have the first question answered. You have testified so far and gotten to the point that you have said that either Weintraub or Politzer mentioned something about Kollisch molesting female employees.

The WITNESS. That was in the process of the meeting.

* * *

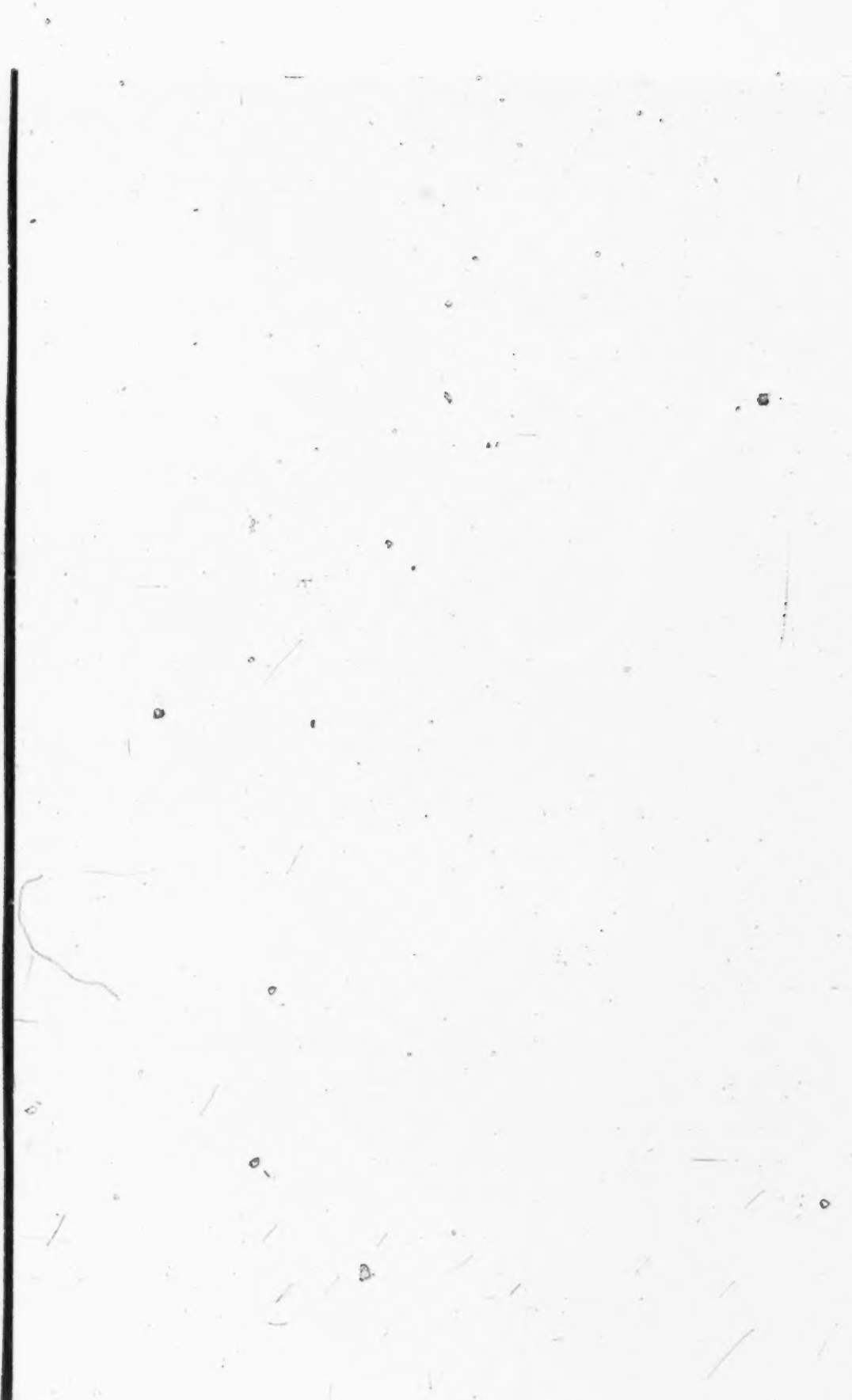
[591] Q. Just give us what he said.—A. Chairman refused to send Kollisch home. Upon Weintraub insisting Kollisch be sent home, Chairman again refused and accused Weintraub of being drunk. Weintraub, thereupon, called the guard and had Chairman removed from the premises, and told Chairman that he was fired.

Q. Can you try to recall now who told you this?—A. Weintraub.

* * *

Q. All right, what was said thereafter?—A. The following day, the following work day—this was by Weintraub.

[592] Q. You are still repeating what Weintraub told you?—A. Within a day or so thereafter, at any rate, Politzer told Weintraub that Chairman was resigning and that Politzer was anxious that the man's record, namely, Chairman's record, so far as his employment with the company goes, be free of anything that might be unfavorable, such as being fired for insubordination. And Weintraub agreed to let the matter go



at that on the understanding that Chairman would leave of his own accord on a resignation within a matter of days. This is still Weintraub giving me the story.

Ten days or two weeks passed by and Weintraub realized—

Mr. MACHT. Is Weintraub still talking?

Q. Weintraub is still telling him this?—A. Ten days or two weeks passed and Weintraub realized since he had the personnel records of resignations, terminations, and so forth, that Chairman had still not resigned or left the employ of the company. He therefore came up to see Politzer to insist on the execution of the agreement they had.

Politzer, now, however, was raising questions as to about Weintraub's authority in the matter. And when Weintraub still insisted, Politzer said, "Let us go in and see Mr. Kende."

[593] That was the reason they came to see me.

Q. Go on; what happened?

A. Well, they presented this picture to me. I told Politzer, in Weintraub's presence—they were both in my office—that in a matter of the type described to me, at a time when Weintraub was specifically designated to supervise order and general discipline in the plant, he was within his authority to act as he did. There was no further conversation to the best of my recollection and they both left my office.

CROSS-EXAMINATION

[611] By Mr. MACHT:

Q. Mr. Kende, I believe you testified earlier to the fact that Politzer was directly responsible to you; is that correct?—A. At that time, that was the situation.

[612] Q. Up until when was he directly responsible to you?—A. Up until approximately a year and a half ago.

Q. That would be about what date?—A. That would be about the Spring of 1945.

Q. Would you clarify what you meant when you said that Politzer was directly responsible to you?—A. Well, in the organization, I gave him his over-all orders for the general performance of the work, over-all directions.

Q. Who were you responsible to?—A. To Mr. Shapiro.

Q. And who was Mr. Shapiro responsible to?—A. Well, I think he is responsible to the Board of Directors of the company as a Vice President of the company.

• • •

[613] Q. Was Mr. Weintraub responsible to Mr. Shapiro?—A. Yes, yes.

• • •

Q. Was Mr. Weintraub your boss?—A. No.

Q. Who was your boss?—A. Mr. Shapiro.

• • •

Q. Mr. Weintraub took care of one side and you took care of the other; is that correct?—A. Yes.

Q. You didn't take care of the office personnel matters, did you?—A. Personnel matters?

Q. In the office?—A. No.

Q. That was Mr. Weintraub's job?—A. Yes; hiring personnel was his job; general discipline was his job.

Q. And once they were hired, and if any employees were sent over into the mechanical engineering phase, then they came under your supreme supervision; is that correct?—A. That is substantially correct, yes.

• • •

Q. How did Mr. Politzer know that he was directly responsible to you and no one else?—A. Well, with respect to this responsibility to me, Mr. Politzer was cognizant of that.

Q. I can't hear you.—A. Politzer was fully cognizant of his responsibility to me.

• • •

[635] Q. What was the date of that termination slip?—A. Some time in January 1944. I don't know the exact date. But I also understand that Politzer fired this man on the insistence of Mr. Weintraub because of events that happened on New Year's Eve, or the day before New Year's Eve. I think that is a complete picture.

Q. Did you at any time designate Mr. Weintraub to discipline Mr. Politzer?—A. No; I never did.

Q. Did anyone ever designate Mr. Weintraub to discipline Mr. Politzer?—A. Do you mean Mr. Politzer?

Q. Yes, sir. I mean Mr. Politzer.—A. Not to the best of my knowledge.

Q. Did you ever designate Mr. Weintraub to discipline men directly responsible to Mr. Politzer?—[636] A. No; I never specifically so designated. I did not.

• • •

[664] Redirect examination by Mr. LEVY:

Q. Mr. Kende, I would direct your attention, please, to the time you have just referred to when Mr. Politzer came to your office and discussed the question of replacing Mr. Chairman. Would you tell us what occurred at that time, what did he say to you and what did you say to him?

• • •

A. Politzer came to me about a week after the time he and Weintraub came to me about the matter of Weintraub's authority, and Politzer said he wanted to have my opinion on the matter of a replacement for Chairman.

He further stated that in his, Politzer's, opinion we should not even try to get an engineer for the job, particularly in view of the unfortunate incident between Mr. Weintraub and Mr. Chairman, and in view of the great shortage of young engineers who were being drafted.

He, therefore, proposed that we promote one of the maintenance mechanics with the best background and experience to be in charge of one shift. Mr. Politzer said he had several men capable of doing this work and I agreed with him—that is, I agreed that we should not put in a [665] personnel requisition for a new maintenance engineer, but that one of the men from the ranks be given the title of foreman on that shift, or assistant foreman—I forget what they call him.

• • •

[667] Mr. LEVY. This is a matter of getting our record, Mr. Examiner, the official record here. Are we incorporat[668]ing the transcript of the other proceedings? It would make the record so bulky.

Trial Examiner FEILER. No; as I have indicated, as the question came up, you have called my attention to a certain line and question, counsel for the Board having done the same thing, and the question having come up as to the general tenor of the testimony there, I will promise to look at it, but I wouldn't make a general incorporation of that testimony. I will say this, whatever you people call my attention to, I will look at there.

Mr. LEVY. In that event, Mr. Examiner, I should like to direct the Examiner's attention, if I may, to two points in the record—just a line or two in each case: One is at page 212—

Trial Examiner FEILER. Excuse me; is that anything to do with the examination of this witness? Let us finish with this witness and then you can direct my attention to any points you have in mind.

Mr. LEVY. All right. I have no further questions.

* * *

Re-cross-examination by Mr. MACHT:

Q. Who did Mr. Politzer place into Mr. Chairman's [669] job?—A. I believe it was a man called Nicholas Sebia.

* * *

Q. And the job is still filled today, is that it?—A. Still filled.

* * *

[671] Q. Who supervised the men on the four to twelve shift from January into February and February of 1944?—A. I have already testified that I believe Nicholas Sebia exercised whatever supervision was necessary thereafter.

Q. Will you tell us whatever supervision Chairman had when he was there and also tell us what supervision Sebia had when he was over the four to twelve shift?—A. Well, with Goldson and Chairman, it wasn't only a question of supervising workmen but also a question of exercising abilities they had as engineers in the way of unusual repairs to machinery which the other men could not normally take care of because they had no engineering training or ability.

Q. Was that the difference in the two jobs?—A. Oh, yes; that is right. Nicholas Sebia would not be called upon to supervise repair jobs of the same kind to the same extent that Chairman and Goldson might be called upon [672] to do. There might have been other limitations put on Sebia's authority which I—

Q. Go on.—A. You will have to ask other witnesses for that who are more conversant with the details.

Q. You tell me what limitations.—A. I can't.

* * *

[678] Q. There is no doubt about it that Sebia took over the four to twelve shift, is there, Mr. Kende?

* * *

[679] A. He didn't take it over in the sense of taking over Mr. Chairman's duties; no.

Q. As I understand from your testimony, and you correct me if I am wrong, he took over all the duties that Mr. Chairman had except those he was not capable of doing, since he was not an engineer and able to work on particular difficult types of machinery.

* * *

A. I explained that I recall that limitation, and I further explained that Politzer would know about further limitations.

Q. But all you know is that one, is that it?—A. Yes; I do recall from Kollisch's testimony just quoted now that this particular man also worked, and that is a major limitation or difference which I did not recall because I had no direct supervision over these men: Politzer would remember better than I.

* * *

[680] Mr. LEVY. I should like to read two very brief statements, a line or two each. Page 103—

Trial Examiner FEILER. This is in the representation hearing?

Mr. LEVY. This is the hearing of November 30, page 102, a statement by Mr. Fierman, counsel for the company, referring to Mr. Shapiro, the managing vice president: "Mr. Shapiro has no adverse interest in this cause and he is willing to give all the information at his command."

The other statement is on page 212, sir, where one of the attorneys gave this statement in examining one of the [681] witnesses—the record will reveal which one—

Mr. MACHT. Zicarelli, I suppose.

Mr. LEVY. I don't know. But upon Mr. Fierman's interrupting, this other attorney, Mr. Stern says: "I am going to object to this line of examination. If the company is interested, I would like to know it. I would like to know what their attitude is. If they desire this group to be members of Local 208 or Local 3."

That appears in the hearing on page 212 which is substantially on in the hearing and it appears in the record of the transcript after the middle of the book.

Mr. MACHT. I want to direct the Examiner's attention to some pages, too. I want to direct the Examiner's attention in addition to those I have already requested him to look at while the witness was on the stand, and this goes to the credibility of Mr. Kende—

Mr. LEVY. I am perfectly willing to have this go on the record—

Trial Examiner FEILER. I am not going to resolve the issue of who is right or wrong except that I will look at it from the standpoint of seeing that there was conflict in the testimony as there is agreement here, as I understand it.

I told you before I will re-read a good deal of that [682] record, perhaps all of it, if I think it becomes necessary. I will be perfectly happy to make any specific references you people care to give me. You can either do that now or at any time, or, perhaps, at the end of the hearing.

* * *

Mr. LEVY. Should there be any need to refer to these pages and some official record in connection with some appeal, I should like to know clearly, if I may, Mr. Examiner, as to whether or not the Board, on an appeal from the Examiner's report, or of a Circuit Court of a subsequent proceeding, whether this transcript is to be made part of that official record or if there is some way of avoiding the expense and cumbersome-ness of doing that.

Trial Examiner FEILER. Incorporating the record in toto, [683] as you have pointed out, would lead to a good deal of expense and trouble later on.

Mr. LEVY. I should say so.

Trial Examiner FEILER. As I have indicated, though, I will look at parts of the prior representation hearing to get generally the issues involved there. That is, primarily for back-ground purposes, because I don't intend to adjudicate that representation hearing. We have got a Board decision on it. Where you people have called my specific attention to a particular page, and perhaps, even a statement read from it, those particular items can be considered part of this record.

I think for that purpose, it isn't necessary right here to do anything more than direct my attention to a particular page without reading extensively into the record. As long as you indicate to me what page you are referring to, and specifically the particular section you want is properly identified for later use, I think that is plenty for counsel at this time. If there is any question about that, I will be glad to consider it further.

* * *

[688] Mr. MACHT. I don't understand your ruling. Do I understand you are only going to look at page numbers without ascertaining whether Chairman testified in the morning and whether Shapiro testified after Chairman?

Trial Examiner FEILER. I am probably going to read the whole record to get the general sense of what happened and what took place. I am going to especially look at, with particular reference, to the references you may have given me.

Mr. LEVY. All right.

* * *

[701] Mr. MACHT. I now call for Mr. Salinsky's records showing the date that he ceased being a guard at the plant, when he became supervisor, and I also call for his time card for the night of November 30, 1943, as well as again calling for the card of Mr. Chairman, time card, November 30, 1943 and November 31, 1943.

Trial Examiner FEILER. What were those dates?

Mr. LEVY. We have no reluctance about producing anything counsel wants.

Mr. MACHT. Those dates are December 30 and December 31st.

Mr. LEVY. I think it is quite a bit off the beam, sir, but we don't have any objection to producing any of these records. I presume counsel would be just as content with a stipulation which would satisfy him.

Mr. MACHT. No; I want those records. We have called for them the first day of this hearing and we also called [702] for them a long time ago.

Mr. LEVY. Let the record show that the counsel called for this the first time today and not at the first day of this hearing.

Trial Examiner FEILER. Counsel for the respondent stipulated his willingness to produce the records.

Mr. LEVY. We will produce whatever records we have, sir. Trial Examiner FEILER. That is right. The record then, that counsel for the Board has asked for and check me on this, Mr. Macht—and as I said before, I want you people to make your own notes as to the records—is the time card of Mr. Chairman for December 30 and 31, 1943; the time card of Mr. Salinsky for December 30, 1943—

Mr. MACHT. Make it December 31st, too.

* * *

[749] SAM PEARL (Respondent's witness).

* * *

DIRECT EXAMINATION

* * *

[769] Q. Were you there in that little stockroom when Mr. Al Salinsky came up there?—A. I was standing right out in front of the door there.

Q. Were you there before Mr. Al Salinsky came?—A. Maybe about three seconds before.

Q. Were you there before Mr. Weintraub came up there?—A. About the same time. Mr. Weintraub was right behind Al at the time.

* * *

[795] IRVING WEINTRAUB (Respondent's witness).

* * *

DIRECT EXAMINATION

* * *

[796] Q. Were you personnel manager in 1943 and 1944?—A. Yes.

* * *

Q. In late 1943 and 1944, Mr. Weintraub, was the Universal Camera Corporation engaged in war production?—A. They were.

[798] Q. Do you recall the night of December 30th, 1943?—

A. Yes.

Q. Do you recall certain events?—A. I do.

Q. Do you recall certain events relating to Mr. Chairman?—

A. I do.

Q. Mr. Weintraub, will you be good enough to settle back in your chair—take it easy—and will you tell us, please, to the best of your recollection, what you recall occurred that night?—

A. In the patrolling of the plant that day, to make sure that there was no drinking, no parties, no rough stuff of any kind, I noticed that in the evening one of our maintenance [799] mechanics, a man by the name of Frank Kollisch, would stand in the hall and was stopping the female employees as they passed by and started to talk to them. I noticed this four or five times, and I finally called Mr. Kollisch with me and brought him into Mr. Chairman's office, Mr. Chairman being the man in charge of the four p. m. to twelve midnight shift.

I asked Mr. Chairman, "What are the duties of this man?"

He then replied "None of your business."

I asked him again, "What are the duties of this man?" and he told me, "I don't have to answer to you."

I told him he definitely has to. He told me that I was drunk. I looked at him and said, "What did you say?" He said, "It is the liquor in you talking."

Thereupon I told him to take his hat and coat and leave the plant. He refused, and I told him again to leave the plant, or I will have the guard up and put him out. He refused.

I went to call the guard, and I was told that the interoffice phones were out of order.

I went downstairs—Mr. Chairman's office was on the sixth floor—I went down to the second floor where the guards were stationed and found Mr. Salinsky on duty down stairs and asked him to come up with me and put Mr. Chairman [800] out. He did so.

When I reached the second floor with Mr. Salinsky, Joe Zicarelli, who was then the steward of the maintenance mechanics, stopped me and asked me would I not forget the incident, that Mr. Chairman was hot headed, lost his temper and did not mean anything by it.

After talking to Mr. Zicarelli for a short while, I told him, "All right," as far as I was concerned, I would forget the incident at that time, figuring that I would take it up tomorrow. There was a night shift working and I did not like to create any disturbance.

Mr. Zicarelli brought me over to Mr. Chairman, took my hand and said, "Shake hands with Chairman." I said, "All right." I turned around and walked away towards the executive offices.

Q. Did you shake hands with Mr. Chairman?—A. That is right.

I must have gone about ten paces when I heard Mr. Chairman again saying, "He is drunk."

I thereupon turned right around and told Mr. Salinsky, our guard, to put him out. Which he did.

Mr. Zicarelli, the steward, told me all the way down to the office, and kept pleading, "Please forget the incident." He will talk to Chairman and get him to apologize. I said, "I am sorry: it could not be done, no member of management, especially one in a responsible [801] position—"

Q. Excuse me. Is this something you told Zicarelli?—A. That is right.

* * *

[802] Q. When was the next time that this matter came to your attention?—A. I think it must have been two, two and a half, maybe three weeks thereafter, I noticed Mr. Chairman on the floor. I located Mr. Politzer and I said, "I understood that Mr. Chairman was to leave." And Mr. Politzer then told me, "Well, he changed his mind." I said, "I am sorry, he leaves as of tonight."

* * *

Q. All right. Continue. What was Mr. Politzer's reaction, and what occurred there?—[803] A. Mr. Politzer told me that he would not let the man go. I looked at him in amazement, and told him, "That is orders."

He said he would not let him go unless he received specific orders from Mr. Kende, his supervisor.

Trial Examiner FEILER. I think you had better read back the last part of the witness' statement.

(The record was read as requested).

The WITNESS. I said, "All right, let us go in and see Mr. Kende right then and there." And we did that. After being in Kende's office for a while, Politzer stating his case, I stating

my reasons for wanting the man dismissed, Mr. Kende told Politzer that if Weintraub insists, he is to be dismissed.

By Mr. LEVY:

Q. Was that the end of the conversation?—A. Yes.

Q. When you say Mr. Politzer stated his case, that does not help us. What did Mr. Politzer say to the best of your recollection?—A. He asked Mr. Kende what authority I had in ordering a man fired. Mr. Kende explained to him that my authority was granted to me by management to fire, especially I was warned about keeping the plant bone dry and quiet before New Years.

Q. What happened after that, Mr. Weintraub?—A. Mr. Politzer made out a termination, sent it down to [804] my office; a girl took him off the pay roll, had his pay made up by notifying the pay roll department, typed a release up for my signature, and we were ready to pay Mr. Chairman off when he came downstairs.

* * *

[825] By Mr. LEVY:

Q. Mr. Weintraub, do you recall any incident involving Mr. Chairman occurring shortly after a hearing in the representation case which took place on November 30th, 1943?—A. I do.

[826] Q. Would you tell us what you recall, please?—A. I received a call from Kende asking me if I would mind coming up to his office and bringing Chairman's folder with me. I said I would and I did. When I entered Mr. Kende's office Mr. Politzer was there; Mr. Kende asked me for Chairman's folder. I gave it to him. He took out Chairman's application, went over it and asked me how come that on the reserve side of the application, which is supposed to show the applicant's prior experience record, it was blank.

I told him that Chairman explained that he had been in business for himself, and that I did not list the people for whom he claimed to have done work. In checking further he noticed that there was a reference from some Hungarian newspaper. Mr. Kende made a statement, "Isn't that a Communist paper?" I told him a bit annoyed, "What difference does that make? There is his folder. What do you want?"

Then he had a discussion about licensed engineers and he turned around and asked Mr. Politzer what he thought of Chairman's work and Mr. Politzer told Mr. Kende that it was satisfactory.

I asked Mr. Kende if that is all he wanted; took the folder and returned to my office.

* * *

[828]

CROSS-EXAMINATION

* * *

[846] Q. Now, Mr. Weintraub; the very next morning, did Mr. Zicarelli have a further talk with you concerning your agreement to forget the incident with him the night before?

* * *

[847] Q. What did you tell Mr. Zicarelli the next morning?—
A. It stays.

Q. That Chairman was through?—A. Through.

Q. He was fired?—A. Right.

Q. But Mr. Chairman was working the very next day, is that [848] right?—A. That is right.

Q. And Mr. Chairman worked the following day, which was a Sunday?—A. That's right.

Q. And Mr. Chairman worked almost a month, until January 25, 1944?—A. Let's make it three weeks.

Q. Correct?—A. Three weeks.

Q. We won't quibble over one or two days.—A. You seem to be.

Q. It was until January 25, 1944?—A. That's right.

Q. And he put in every hour together with overtime together with Sundays?—A. That's correct.

* * *

Q. Mr. Weintraub, did Mr. Chairman ever tell you that he was going to leave the company?—A. Not me.

Q. Did you again ask Mr. Chairman to leave the company?—A. When?

Q. At any time? After December 30th?—[849] A. No; I did not.

* * *

By Mr. MACHT:

Q. Who did you ask prior to January 25th to get Chairman to resign?—A. To get Chairman to resign?

Q. Is that clearer than to quit?—A. To get Chairman to resign?

Q. Yes.—A. I asked nobody.

* * *

[851] Q. When did you have an understanding that Chairman was to leave the employ of the company?

* * *

A. The very next day after the incident I saw Mr. Politzer.

* * *

[853] Q. What did you tell Mr. Politzer about Mr. Chairman?—A. I started to tell Mr. Politzer about the Chairman incident, and he told me he heard all about it from Chairman, and that Chairman had resigned.

Q. He told you Chairman had already resigned?—A. That is right; that "he had come in to see me, and that he had resigned."

* * *

[854] Q. What did Mr. Politzer say to you?—A. He told me that he knows all about it before I could even go into it; that Chairman had resigned and was going to leave within ten days to two weeks. I said, "Fine. I will let it ride until he leaves."

* * *

[887] Mr. MACHT. I want Mr. Chairman's two time cards, for December 30th and 31st. I requested them and I understood, the first day of this hearing, counsel for the respondent was going to have them produced.

Mr. LEVY. The records are open.

Mr. MACHT. Well, I haven't gotten them yet, and now I am told it would be three to five days more.

The WITNESS. They are in the warehouse. We have to go through the records to pull it out. I do not know who is on the night shift. I did not say Chairman, three to five days.

Mr. MACHT. How long would it take you to produce Chairman's two time cards, for December 30th and 31st, 1943?

The WITNESS. Probably tomorrow.

* * *

[943] BENAMIN F. POLITZER (Respondent's witness).

DIRECT EXAMINATION

* * *

[944] Q. Were you employed at the Universal Camera Corporation in 1943, Mr. Politzer?—A. I was.

[945] Q. And in 1944?—A. Yes, sir.

Q. In what capacity?—A. As a plant engineer of the optical department.

* * *

Q. You say you testified at the representation proceeding?—A. Yes, sir.

Q. In November 1943?—[946] A. Yes, sir.

* * *

[948] Q. During the latter part of 1943, Mr. Politzer, do you recall some activities in connection with union organization

among the maintenance men?—A. Yes. Men were trying to organize and there was the biggest topic of conversation around the plant in the spare moments we had. Inside the plant and outside, this was going on. I spoke to Joe—

Q. Joe who?—A. Joe Zicarelli. And Chairman and Harry Goldson. The men, they had quite a lot of talks with them.

Q. During what period was this?—A. All the while that they were trying to form, become unionized, get union representation, until they did.

Q. Can you place—try and place the time. Was that going on in November of 1943?—A. Yes, sir.

Q. And before that?—A. Yes, sir.

Q. About how long before that, approximately?—A. I would say a couple of months, at least.

• • •

[966] Q. After that hearing on the 30th, Mr. Politzer, when was the next time any official of the company ever talked [967] to you about Mr. Chairman?—A. It was the day after Imre's run-in with Mr. Kende.

Q. Who is that "Imre"? When you say "Imre," you mean Mr. Chairman?—A. That is right.

• • •

Q. Go ahead.—A. I was called into Mr. Kende's office.

Q. Yes?—A. Kende said, "Who is this fellow, Chairman?" I said, "He is the maintenance foreman on the 4 to 12 shift." Mr. Kende said—

Q. Why don't you sit back and relax and repeat the conversation to us, Mr. Politzer.—A. "I was leaving the plant last night and met Imre in the hall."

Q. Yes?—A. "I called his attention to the fact that he had said [968] that all 33 men work for him and that it wasn't true, and Imre called me a liar and became quite abusive and questioned my ability as an engineer and said I should have stood up for the men instead of for the company."

And Mr. Kende made the remark that either the fellow is deliberately falsifying the truth or he didn't know what it is all about and, if he didn't know what it was all about, didn't know his own job; so what kind of an engineer was he?

I told him that his work was fairly satisfactory. I hadn't had any complaints about him.

Just about that time, Mr. Weintraub came in with a folder and he gave Mr. Kende the folder. Mr. Kende looked at it; he notice that there is nothing in back here about his previous employment." He asked me what I know about it.

pulled out Imre's application. He looked it over and said, "I

I told him that I had spoken to Imre when he applied for the job and he told me that he had been in business for himself before he came to us, and that he had a degree. I told him that I gathered he was pretty much of an architect rather than a mechanical engineer.

Kende looked into the files some more and picked up a letter there and he asked me, did I know what it was. I said, "No." [969] He said, "I believe this is a Communist paper, and this, and from the way he ranted on the staircase, I think the fellow is a Communist." Weintraub then said, "What difference does that make?"

The rest of the conversation then was pretty much between Mr. Weintraub and Mr. Kende, and Mr. Kende asked him whether he had interviewed Chairman and he said he had, and Weintraub said that Imre had told him he had been in business for himself and that he believed he had shown him a certificate of membership in the professional engineers, and Mr. Kende said, "Anybody can belong to that, that can pass a test." And Weintraub said, "You are a member of the ASME, which is about the same thing," and Mr. Kende questioned Weintraub as to whether he had asked for any professional references, and Weintraub said he had just asked for two references. And they were in the file and I believe we left shortly thereafter or just about that point.

I think I told Mr. Kende that I would check into his work further since he seemed to have some doubts as to his ability, and we left.

* * *

[979] Q. Did you ever talk to Mr. Kende about that again?—A. Yes; a day or so later. I happened to be in Mr. Kende's office on some other matter. I told him that I checked and had been told that Imre wasn't a Communist. He thanked me and we went about our business.

* * *

[980] Q. When did you first hear about the incident that occurred on the night of December 30, 1943?—A. It was the first work day following the incident.

Q. Yes?—A. Imre came in very early that day and he came up to me and he said, "Ben, has Weintraub got the right to fire me?"

I said, "No. What happened?"

[981] He told me that on the night of December 30, Weintraub had come in the office with Frank Kollisch and he told me he wanted Frank put to work and Imre said that he told Weintraub that Frank was working, and Weintraub said he

wasn't, and then, the more Imre tried to explain to Weintraub that Imre was working——

Trial Examiner FEILER. Excuse me. You said "Imre was working".

A. I mean, Frank was working. The madder Weintraub got. And then Weintraub became very heated and that Weintraub was drunk at the time and talked in a loud drunken voice, and Weintraub insisted that he be put to work.

Imre told him that he wasn't his boss and that I was his boss and Weintraub got madder and madder and told Imre to go home, and Imre said he wouldn't, he didn't recognize Weintraub's authority and he said, finally, Weintraub called the guard and, Imre said that he left with the guard and he wanted to talk to me about it.

I asked Imre whether anyone else around the plant had seen Weintraub and knew that Weintraub was drunk. He said yes and Weintraub was very loud and anybody could see it and hear him. I said that is fine and I would go to bat for you about that.

[982] With that, Imre went away and I waited around to check with some of the men that were around on that shift and I checked with a number of them. One of them was Sam Pearl. I think his is the only name I can remember. They told me that they hadn't seen anything of the incident.

I asked him whether Weintraub was drunk.

* * *

[986] Trial Examiner FEILER. This conversation that you are about to tell us with Weintraub, when did that take place?

The WITNESS. The following morning.

Trial Examiner FEILER. That would be the second working day after the incident of the 30th; is that right?

The WITNESS. That is right.

* * *

[987] A. I was out in the corridor outside of my office and Weintraub came along. He said, "I hear you have been [988] investigating me as to whether I was drunk or not."

I said, "Yes."

He said, "You ought to know me better than that, that I don't drink. I was dead tired that night—the night of December 30—and I had been on my feet all day and this was late in the night and there was a lot of pressure on me and I was there under explicit order of Mr. Githens."

Q. Who is that?—A. Mr. Githens?

Q. Yes. Spell that.—A. G-i-t-h-e-n-s.

Q. Who is Mr. Githens?—A. The president of Universal Camera.

Q. Yes?—A. "You know damn well that I wouldn't drink under conditions like that. I was here to see that there was no drinking." This is Weintraub talking. "I was going to forget this whole matter with Imre but since he is raising the issue of drunkenness, I want him fired."

I argued with him and he wouldn't listen to me and he went in one direction and I went away. Later on that day when I saw Imre, I told him that Weintraub was insisting that he be fired. Imre was kind of blue. He said, "The men in the shop wouldn't back me up. I am [989] going to quit. I will give you my written resignation and I will quit in about ten days. I need that time to straighten out my affairs."

I called Weintraub and I told him that Imre was going to give me his written resignation and Weintraub said, "Well, if that is the way he wants it, I will play ball with him." That ended the conversation.

I didn't hear anything more about it, in fact, I didn't give it any thought until a couple of weeks later Weintraub asked me—he said, "What happened to Imre's resignation?"

I didn't know as I had forgotten all about it. And I told him I would check and let him know.

I saw Imre and asked him—reminded him—of it. The fact—that is, I reminded him of the fact that he told me he was going to give me his resignation, and Imre told me that he had changed his mind.

I called Weintraub and told him that Imre had changed his mind and he said that he was going to insist that he be kept to his bargain and that he leave. The next thing I knew Weintraub came up and started, and told me that he wanted Imre fired.

I argued with him. I told him I liked Imre. I didn't see anything to make a big fuss about. He said he was lowering his prestige in the eyes of the rest of the people.

[990] I told him I didn't think he had the right to fire him and he said, "All right. Let it go in to Kende."

We went into Kende's office and we told Kende the story. Weintraub made a point of the fact that Imre called him drunk would lower his prestige in the eyes of the personnel and that he would have difficulty in having his orders followed in the future. He said he was there on the explicit orders of Mr. Githens and as such, any defiance of him was tantamount to a defiance of Mr. Githens and that Imre had already said he was going to quit and he was insisting that he live up to that.

Mr. Kende said that Weintraub explained it, the way he

explained it, that Weintraub was perfectly correct, and so I went back to my office and made out a termination slip for Imre. I didn't hear—

Q. Just a moment, Mr. Politzer. I should like to show you the termination slip. I show you a paper, Mr. Politzer, which has been marked "Respondent's Exhibit 9" for identification, and I ask you if you know what this paper is?—A. Yes, sir.

Q. What is it?—A. It is the termination slip that I made out for Imre.

Q. Is it signed by you?—A. Yes, sir.

Q. Thank you.—[991] Mr. LEVY. I offer it in evidence.

EXAMINATION ON VOIR DIRE

• • •

[992] Q. Did you put down "Discharged," and is that your handwriting in code there, 37?—A. Yes, sir.

Q. And the code is on the bottom of the paper, is that it?—A. Yes, sir.

Q. Which goes to misconduct?—A. I don't know.

• • •

[994] Trial Examiner FEILER. I will receive the paper in evidence, except for the statement at the very top which [995] reads, "Off pay roll, 1/25/44," which the witness has no knowledge of. The rest of it will be received in evidence as Respondent's Exhibit 9.

• (Respondent's Exhibit 9 for identification was thereupon received in evidence.)

• • •

DIRECT EXAMINATION (CONTINUING)

• • •

[996] Q. The date on this slip is January 24, 1944; right?—

A. That is right.

Q. And that was the date you made it out?—[997] A. Yes, sir.

Q. You would have to put the correct date on there?—A. Yes, sir.

Q. And it says "date effective, 1/25/44"?—A. That is right.

Q. And to the best of your recollection, was this slip made out the same day that Mr. Weintraub—we will come back to that. I notice that this code number, 37, says on the back, "Misconduct. Give specific cause."

— You haven't given any specific cause. Can you tell us why or what you remember about that?—A. I don't think in all the time that I have been in there that I ever done that.

Q. Mr. Politzer, you said that you were mad when you filled this out. What did you mean by that?—A. Yes, sir; I was mad at Mr. Weintraub's going over my head and Mr. Kende having backed Weintraub up.

* * *

Q. Will you place the date of that conversation in Kende's office?—[998] A. It was roughly two weeks after this incident between Weintraub and Chairman.

Q. When you say roughly, what do you mean?—A. Well, I didn't remember the date until I saw the termination slip. It was the 24th.

Q. You know it was the same day you made out the termination slip?—A. Yes, sir.

Q. You know that, Mr. Politzer?—A. Yes, sir.

Q. Positively?—A. Yes, sir.

Q. You had no other conference with Kende before that about this matter?—A. That is right.

Q. There was only one conference with Kende, the one you testified to with Weintraub?—A. Up to date; yes.

* * *

[1000] Q. After this conversation with Mr. Kende and Mr. Weintraub, which you testified was on January 24, 1944, the date upon which you made out this notice, did you have any further conversation with either Mr. Weintraub or Mr. Kende in connection with this position that Mr. Chairman had held?—A. Yes; a day or so later I was called into Mr. Kende's office and he had the replacement application in front of him and Mr. Kende said he was doubtful as to whether to sign it or not. We had—

Q. Who said this?—A. Mr. Kende. He said he recalled it to my attention that we had a great deal of difficulty filling that position in the past; there had been long times when the department had been without [1001] a maintenance engineer; the young fellows that we did get never lasted long, they either were drafted or quit to go to another job; a lot of fellows with engineering degrees were in aircraft companies; fellows without degrees were going to night school, and, therefore, the hours were no good, and he thought that—he wondered—if there was any way we could fill the job more easily.

I said yes, that during those times when we had no junior engineer on the job, we had made use of one of the men and Mr. Kende said, "Well, in line of our previous experience in that job, the awkward situation we had with Imre, I think it would be a good idea not to sign this slip."

It was decided for me to upgrade one of the men, in I thought I had one of the men who could fill the job.

I told him I had one, Nicholas Sebia, and he was a good man, steady, and I thought he could handle the men.

Mr. Kende said all right and that I should upgrade him to foreman, or working foreman.

* * *

[1002] Q. Mr. Chairman testified that he was working on some plans that you gave him; do you recall that? Did you ever give him any work to do that required engineering skill?—

A. Yes, sir.

Q. Did you ever give Mr. Sebia that kind of work?—A. No, sir.

* * *

[1007] Q. Did you tell Mr. Chairman after the Weintraub incident on December 30 that Weintraub was talking through his hat with respect to being able to fire Chairman and that he had no authority to fire him?—A. I may have made some remark like that. I was quite worked up.

Q. What do you mean "worked up"?—A. Well, I resented Weintraub's stepping over my head. It was one of my men. I was mad at the company at the time because we have two maintenance departments and we had some run-ins there. I felt that there should have been only one, and I should have been in charge of it, and I resented anybody that would come along and take any of my authority away.

* * *

[1013] Q. I ask you now, Mr. Politzer, is it possible that when you came back from Kende's office that time that you might have said to Chairman or to Goldson that the company is out to get Mr. Chairman because he testified?

Is it possible that you might have used language like that?—A. It is possible. I was quite worked up. There was a lot, an awful lot of feeling, and I don't know how to get it over:

* * *

[1019]

CROSS-EXAMINATION

* * *

[1026] Mr. LEVY. Mr. Examiner, I should be glad to stipulate, if the Board's counsel wishes, and if the Examiner believes it would be helpful that these men were responsible to Mr. Politzer, and Mr. Politzer was responsible to Mr. Kende.

* * *

[1027] A. I never told the men that I was their only boss. The occasion has never arisen to make any statements.

Q. It was just understood that you were their boss, wasn't it?—A. Yes.

. . .

[1071] Q. Now, you tipped Harry Goldson off as to your conversation with Mr. Kende, did you not?

. . .

A. I told Harry about the conversation that we had, and I told him I had tipped Imre off that Kende had gone through his folder, that he was mad at him and he thought he was a Communist.

Q. What did you tell Harry Goldson as to the conversation you had with Mr. Kende and Mr. Weintraub?—A. I told him that Kende was mad at him because Imre had defied his authority and Kende was mad at him for having ranted and raved at him, questioned his ability as an engineer, or his seniority as an engineer. And Kende thought that Imre was a Communist.

. . .

[1072] Q. Did you tell Mr. Goldson to tip Chairman off?—A. Yes; I told him to tip him off.

. . .

[1098] Q. What made you so angry at Mr. Weintraub?

. . .

A. I was angry at him. I thought it was interference in my department.

. . .

[1100] Q. Mr. Politzer, I show you what is in evidence as Respondent's exhibit 9, and ask you when did you make that out?—A. January 24, 1944.

Q. Was that before or after you had a talk with Mr. Kende and Mr. Weintraub concerning Mr. Weintraub's authority?—A. That was after.

[1101] Q. How long after?—A. A few minutes after.

. . .

[1103] Q. And did Mr. Chairman return to work the following day, the 25th, I believe you have already said yes.—A. Not that he came to work, that I saw him.

Q. Yes. When did you see him at that time?—A. Well, again I don't remember the exact time of the day. I think it was around four o'clock.

Q. That is the time he was to report to work, wasn't it?—A. That is right.

Q. Did he come up to go to work?—A. No.

Q. Was he with some one when he came up?—A. He was with a guard.

• • •

[1104] Did Mr. Chairman get his papers and things; personal belongings?—A. Yes, sir.

• • •

Q. Now, what did he, Mr. Chairman, say to you—correct that, please. Did you have a conversation with Mr. Chairman?—A. I said I was sorry to see him go and I said goodbye to him and wished him luck.

Q. Do you recall any further conversation that you had with him?—[1105] A. Well, I believe Imre was right when he said that we used a Hungarian term of greeting.

Q. You heard Imre testify to that?—A. Yes, sir.

Q. What he testified to is true, isn't it, on that last occasion?—A. Yes.

• • •

[1114]

REDIRECT EXAMINATION

• • •

[1119] Q. When Mr. Chairman told you about the Weintraub incident, and you said you would go to bat for him, what did you mean?

• • •

A. Well, more than going to bat for him, I was really going to bat for myself. I felt Weintraub was lowering me in my own eyes by giving my men orders.

• • •

[1177] Trial Examiner FEILER. On the record. I filled out the subpoena. Do you want to accept service on behalf of the company, Mr. Levy?

Mr. LEVY. I will do anything that will help matters. I will be happy to accept service.

Trial Examiner FEILER. I will hand the subpoena to you now.

Mr. LEVY. Thank you.

Trial Examiner FEILER. I made it returnable for 4 o'clock this afternoon, because some work has been done on this, as I understand, already. Some of it is new. I just want to see what is accomplished and see what has [1178] been done at that time.

• • •

Trial Examiner FEILER. Let the original of the subpoena be marked as Board's Exhibit 11.

(The document above referred to was marked "Board's Exhibit 11" and received in evidence.)

• • •

[1181] JOHN E. KEARNS (Board witness called in rebuttal).

DIRECT EXAMINATION

Q. Have you been employed by the National Labor Relations Board as a field examiner in the years 1943 and 1944 and part of 1945?

[1182] A. I was.

Q. In your investigation work as field examiner did you have the case of Universal Camera Corporation, 2-C-5760, the case involved herein for investigation?—A. I did.

[1184] By Mr. MACHT:

Q. After you had obtained that information from Mr. Salinsky, did you make a further investigation in about the end of September or first of October, 1944?—A. Yes.

Q. What did you do concerning that?—A. I again saw Mr. Weintraub and I requested the time card of Mr. Chairman for that night of their argument. Weintraub asked me why I wanted it.

I told him that I wanted to be sure of what time Mr. Chairman quit work that night.

He asked me then why that was important and I said I wanted to see when he actually left the building.

So Weintraub then told me that Chairman worked this whole shift; he stayed there until quitting time, and he said, therefore, there wasn't any need of me to see that time card.

Q. Did he give you that time card?—A. He did not.

[1185] Q. Was this over at the plant that you saw Mr. Weintraub the second time?—A. Yes.

[1198] IMRE CHAIRMAN (Board witness, called in rebuttal).

DIRECT EXAMINATION

[1199] Q. About when did you receive that letter from Mr. Klemin or Dr. Klemin?—A. June 2, 1924.

Mr. MACHT. I offer that in evidence and give counsel for respondent a copy.

Trial Examiner FEILER. That letter has already been marked as "Board's Exhibit 6" for identification.

Trial Examiner FEILER. I will allow it in evidence.
(The document above referred to was marked "Board's Exhibit 6" and received in evidence.)

* * *

[1207] Q. Mr. Chairman, were you either escorted out of the [1208] plant by Al, the guard, or ejected or taken to the door of the plant by Al Salinsky, the guard, on the night of December 30, 1943?

* * *

A. No.

* * *

A. No; not on the 30th.

Q. Were you escorted out of the plant by Al Salinsky at any time?—A. On January 25 I was arrested by him, taken up in the office and then I was taken out to the landing of the stairs.

* * *

[1210]

CROSS-EXAMINATION

* * *

[1241] By Mr. LEVY:

Q. On November 30, Mr. Chairman, 1943, when you testified at the representation hearing, what time did you testify?—

A. Oh, I testified from the morning up until around 1 o'clock, as far as I can recall, roughly, the luncheon recess.

Q. And then after the luncheon recess?—A. Just briefly again.

* * *

[1255] Trial Examiner FEILER. Counsel wants to know whether or not at that time, at that conversation on December 31, some time in the morning; you told Politzer that a guard [1256] had escorted you out of the building the night before in connection with the Weintraub incident?

* * *

The WITNESS. I described it exactly as it happened and I told him that the guard excused himself. He told me he was glad he doesn't have to put me out. He went out of my office. I was sitting there and then I left at the regular time. I made out my report. I punched my card and went home.

* * *

[1287] IRVING WEINTRAUB (Respondent's witness recalled in rebuttal).

* * *

[1288]

DIRECT EXAMINATION

* * *

Q. This morning I gave you a list of the number of papers that I asked you to look for in response to a subpoena duces tecum?—A. That is right.

* * *

Q. Will you please tell the Examiner the efforts you have made to find those records, the situation with respect to those records, and the amount of time you say may be required to find any of the records?—A. The attendance sheets, the maintenance engineering reports—

[1289] Trial Examiner FEILER. Excuse me, since you are reading from the subpoena, it may be easier for you to identify them by items as well as what they are.—A. All right. Item 1, the attendance sheets.

Item 3, the maintenance engineering reports;

Item 4, the production records: I have found that they have been thrown out some time after VJ-day when we had to have more room for new projects.

Item 2 (that is Chairman's time cards) and item 5, the time cards showing all the production workers' time cards are in the warehouse some place. I sent one of my assistants, Miss Lung-herd, and she went through several cases and couldn't find them.

The warehouseman refused to open any more crates for her. She said there were about 14.

By Mr. LEVY:

Q. When was this, Mr. Weintraub?—A. I sent her out at 10 minutes to 12.

Q. Today?—A. Today, and she called me—I think it was around 2 o'clock or slightly thereafter—to tell me that the warehouseman has opened four crates for her and refuses to open any more, and that we will have to bring all the stuff, put away not only in this warehouse but in other warehouses, to our plant and open it, and he refuses to open any more.

[1290] He hasn't got the manpower nor the space for it.

Q. Is it possible for you to estimate how long it might take to go through all those crates to find these records?—A. As I said the other day it would take anywhere from three to five days, because, as I understand, the crates aren't labeled as to what is in them. All we know is they are time cards. We don't know what month, what week, or what year.

Q. These are the time cards?—A. Time cards.

* * *

CROSS-EXAMINATION

* * *

[1291] Trial Examiner FEILER. You say you do have the time cards somewhere in the warehouse?

[1292] The WITNESS. That is right.

Trial Examiner FEILER. You do have them for 1943?

The WITNESS. Oh, yes. We don't destroy them.

* * *

BOARD'S EXHIBIT 1C

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SECOND REGION

Case No. 2-C-5760

In the Matter of UNIVERSAL CAMERA CORPORATION *and* IMRE
CHAIRMAN

COMPLAINT

It having been charged by Imre Chairman, 354 East 19th Street, New York 3, New York, that Universal Camera Corporation, 28 West 23rd Street, New York, New York, has engaged in and is now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, 49 Stat. 449, hereinafter referred to as the Act, the National Labor Relations Board, hereinafter referred to as the Board, by the Regional Director for the Second Region as agent for the Board, designated by the Board's Rules and Regulations—Series 4, Subpart B, Section 203.11, hereby issues its complaint and alleges as follows:

1. Universal Camera Corporation, hereinafter referred to as Respondent, is and has been at all times herein mentioned a corporation duly organized under and existing by virtue of the laws of the State of Delaware.
2. At all the times herein mentioned, Respondent has maintained its principal office and place of business at 28 West 23rd Street, in the City of New York, County of New York, and State of New York, hereinafter called the New York plant, and is now and has been continuously engaged at said plant, in the manufacture, sale and distribution of optical lenses, binoculars and related products.
3. During the past year Respondent, in the course and conduct of its business operations, caused to be purchased, transferred and delivered to its New York plant, glass fabricated parts and other materials valued at in excess of \$1,000,000, of which approximately 50 per cent, was transported to said New York plant in interstate commerce from states of the United States other than New York.

4. During the past year Respondent, in the course and conduct of its business operations, caused to be manufactured at its said New York plant products valued at in excess of \$1,000,000, of which approximately 50 per cent was transported from said New York plant in interstate commerce to states of the United States other than the State of New York.

* * *

BOARD'S EXHIBIT 1G

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR
RELATIONS BOARD

SECOND REGION

Case No. 2-C-5760

In the Matter of UNIVERSAL CAMERA CORPORATION *and* IMRE
CHAIRMAN

ANSWER OF RESPONDENT, UNIVERSAL CAMERA
CORPORATION

In answer to the complaint of the matter above captioned,
the UNIVERSAL CAMERA CORPORATION admits, denies
and alleges as follows:

1. Admits the allegations contained in Paragraphs "1", "2",
"3", "4", "5", and "6".

• • •

(88)

BOARD'S EXHIBIT 6
NEW YORK UNIVERSITY
COLLEGE OF ENGINEERING

UNIVERSITY HEIGHTS, NEW YORK

Department of Mechanical Engineering

Telephone: Fordham 3600

JUNE 2ND 1924.

To the CHIEF ENGINEER

*Curtiss Aeroplane & Motor Corporation,
Garden City, L. I., N. Y.*

DEAR MR. GILMORE; Just a line to say that Mr. Csernyak is studying aeronautics here with us, and has helped us a great deal in the erection of the tunnel, which your company so kindly donated to us. He is coming back in the fall to enter on his senior year, and wishes to keep busy in an airplane plant this summer. If you can use him in any capacity it would certainly help him in his studies and in paying his way through college.

Sincerely yours,

(S) ALEXANDER KLEMIN,
Associate Professor of Aeronautical Engineering.

(87)

BOARD'S EXHIBIT XI

SUBPENA DUCES TECUM

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

To UNIVERSAL CAMERA CORPORATION, 28 West 23rd Street,
New York City:

You are hereby required to appear before Sidney L. Fieler, a trial examiner of the National Labor Relations Board, at 120 Wall Street, 24th Floor, Room 25, in the City of New York on the 7th day of November 1946, at 4 o'clock p. m. of that day, to testify in the Matter of Universal Camera Corporation.

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

1. Attendance sheets showing attendance of production workers, maintenance mechanics and foremen for the nights and days of December 29, 30, 31, 1943, and January 1, 2, 3, 4, 1944.

2. Time cards of Imre Chairman showing number of hours worked by him on December 29, 30, 31, 1943, and January 1, 2, 3, 4, 1944.

3. Maintenance engineer reports made by Imre Chairman for December 30 and 31, 1943.

4. Production records showing production for the days and nights of December 29, 30, 31, 1943, and January 1, 2, 3, 4, 1944.

5. Time cards of company showing number of hours worked by production workers and maintenance mechanics for December 29, 30, 31, 1943, and January 1, 2, 3, 1944.

Fail not at your peril.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at New York this 7th day of November 1946.

(S) JOHN M. HOUSTON.

Notice to Witness.—If claim is made for witness fee or mileage, this subpoena should accompany voucher.

RESPONDENT'S EXHIBIT 9

UNIVERSAL CAMERA CORP. *1/25/44*

NOTICE OF TERMINATION OF SERVICE

PLEASE ARRANGE TO SEND THE ORIGINAL AND DUPLICATE COPY OF THIS FORM TO THE EMPLOYMENT OFFICE BEFORE EMPLOYEE'S ARRIVAL FOR FINAL INTERVIEW

NAME *W. H. H. H.*
 DEPARTMENT *Dept. H. H.*
 TITLE *Chief Clerk*
 RATE OF PAY *\$3.75*
 DATE OF EMPLOYMENT *5/24/42* EMPLOYEE NO. *1*

REASON *Discharged* INDICATE CODE NUMBER AND STATE CAUSE DESIGNATED ON REVERSE SIDE OF THIS NOTICE
225760 RT

RESIGNED	Disposition Reserved Rejected	Identified
RELEASED		
DISCHARGED		
LAID OFF		
DECEASED		
RETIRED	In the Matter of <i>Termination</i> <i>3/1/44</i>	
OTHER CAUSE	Date <i>1/25/44</i> Witness <i>W. H. H. H.</i> Reporter <i>W. H. H. H.</i>	

PLEASE CHECK THE FOLLOWING:

	EXCELLENT	SATISFACTORY	UNSATISFACTORY
ABILITY		<input checked="" type="checkbox"/>	
EFFORT		<input checked="" type="checkbox"/>	
ATTITUDE			<input checked="" type="checkbox"/>
ATTENDANCE		<input checked="" type="checkbox"/>	

INDIVIDUAL *W. H. H. H.* WOULD NOT BE A GOOD SUBJECT FOR RE-EMPLOYMENT IN COMPANY DEPARTMENT

INDIVIDUAL *W. H. H. H.* TO BE REPLACED

REMARKS *RC 1/5/46 1/16/40*

DATE EFFECTIVE *1/25/44* TO BE PAID TO INCLUDE *1/24/44*

SIGNED *W. H. H. H.* DATE *1/24/44* 41

INSTRUCTIONS

SELECT ONE OF THESE DEFINITE CAUSES FOR THE REASON DESIGNATED

(1) RESIGNED

- 1—RETURN TO SCHOOL
- 2—PERSONAL REASONS
- 3—NOT KNOWN
- 4—ANOTHER POSITION
- 5—WAGES
- 6—LOCATION OF WORK
- 7—HOURS OF WORK
- 8—KIND OF WORK
- 9—ILL HEALTH
- 10—MARRIAGE
- 11—LEAVE IN CITY
- 12—UNABLE TO GET ALONG WITH SUPERVISOR (GIVE SPECIFIC CAUSE)
- 13—BY REQUEST
- 14—OTHER CAUSES (GIVE SPECIFIC CAUSE)

(2) RELEASED

- 20—INCOMPETENCE OR FREQUENT ERRORS IN WORK
- 21—PRISON
- 22—TARDY OR ABSENT FREQUENTLY
- 23—UNAUTHORIZED OR UNWARRANTED ABSENCE
- 24—ATTITUDE TOWARD FELLOW EMPLOYEES OR SUPERVISOR (GIVE SPECIFIC CAUSE)
- 25—INABILITY TO BECOME ADAPTED TO ASSIGNED WORK
- 26—ILL HEALTH
- 27—UNSATISFACTORY REFERENCES
- 28—MISCONDUCT (GIVE SPECIFIC CAUSE)
- 29—OTHER CAUSES (GIVE SPECIFIC CAUSE)

(3) DISCHARGED

- 30—INDICATIONS OF DISHONESTY
- 31—INDICATIONS OF DRUNKENNESS OR DRUG HABIT
- 32—DISOBEDIENCE OR INSUBORDINATION
- 33—VIOLATION OF THE COMPANY'S RULES
- 34—INDICATIONS OF INTERFERENCE TO FELLOW EMPLOYEES OR THE COMPANY'S PROPERTY
- 35—NEGLECT OF DUTY
- 36—INDICATIONS OF WILFUL DESTRUCTION OF THE COMPANY'S PROPERTY
- 37—MISCONDUCT (GIVE SPECIFIC CAUSE)
- 38—OTHER CAUSES (GIVE SPECIFIC CAUSE)

(4) LAID OFF

- 40—LACK OF WORK
- 41—LACK OF WORK—AT THE DISCRETION OF THE BOARD GRANTED A SEPARATION ALLOWANCE—TABLE IV
- 42—LACK OF WORK—SEPARATION ALLOWANCE—TABLE V
- 43—OTHER CAUSES (GIVE SPECIFIC CAUSE)
- 44—OTHER CAUSES—AT THE DISCRETION OF THE BOARD GRANTED A SEPARATION ALLOWANCE—TABLE IV
- 45—OTHER CAUSES—SEPARATION ALLOWANCE—TABLE V

(5) DECEASED

- 50—DECEASED

(6) OTHER CAUSES

A "NOTICE OF TERMINATION OF SERVICE" IS NOT REQUIRED FROM THE DEPARTMENT FOR EMPLOYEES WHOSE SERVICES ARE TERMINATED UNDER THE PROVISIONAL RETIREMENT PLAN.

WHEN AN EMPLOYEE LEAVES WITHOUT REASONABLE NOTICE, NOTE IT UNDER "REMARKS".

WHEN AN EMPLOYEE IS DISCHARGED, OR REPEATED, OR RESIGNS BY REQUEST, A LETTER MUST BE SENT TO THE EMPLOYMENT OFFICE WITH "NOTICE OF TERMINATION OF SERVICE" EXPLAINING THE CIRCUMSTANCES.

IN THE
United States Court of Appeals
For the Second Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

UNIVERSAL CAMERA CORPORATION,

Respondent.

APPENDIX TO RESPONDENT'S BRIEF

ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

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[1]

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
SECOND REGION

Case No. 2-C-5760

In the Matter
of
UNIVERSAL CAMERA CORPORATION
and
IMRE CHAIRMAN

120 Wall Street,
New York, New York,
Monday, October 28, 1946.

Met, pursuant to notice, at 10:00 o'clock a. m.

Before:

SIDNEY L. FEILER, *Trial Examiner.*

[4]

PROCEEDINGS

[29] FRANK KOLLISCH (Board witness).

Direct examination:

[31] Q. Will you please tell us, is there such a thing as an emergency call work over there? A. Yes, at that particular time we were under war-work and every minute counted and that is where I was put to try to clear up any trouble, if it occurred.

Q. Tell me just were you on emergency call? A. There is no particular man on emergency call. Every one is on emergency call if he is in the shop. If a job occurs he goes out and handles it.

Q. Will you explain just what you do when you are on the job in such a case? A. At that particular time there was slips issued. They went to the front and they came down from the front [32] and came right in the shop and the man, or Mr. Chairman, brought it down or the supervisor in charge brought it down and we attended to it.

Q. Do I understand from you, if something went wrong, the man in the shop would issue a slip and send it to the chairman. A. The supervisor or the man in charge of the particular department.

Q. And then Mr. Chairman was your supervisor? A. Yes, Mr. Chairman was my engineer and also my supervisor, naturally.

Q. And he would then do what with the slip? A. Hand it to one of us.

Q. When you say one of us, who do you mean? A. At that particular time, I don't recall how many men we had on our particular shift, but any one of the men from the maintenance department used to handle anything that came in.

Q. Was it necessary that you maintenance men have any particular post where you were to be? A. No, our particular post was in the shop if we weren't doing anything else. Mr. Chairman figured the best thing was to have us available in the shop so that when anything did occur he could get hold of us and send us out on the job. It would do no good if we were to wander around and he would [33] send for us and not find us.

Q. In other words, you remained in the shop whether you had any particular work or not? A. No, if we had a job we were out on the job; if we didn't have a job, we were in the shop.

Q. If you didn't have a job to work on, you would be in the shop doing what? A. Well, there was many miscellaneous things that we could do. That particular night, Chairman gave me a little some type of pipe finish to work on. I had finished it and I didn't feel like working any more, so I was waiting for a call.

. . .

[41] Q. And you don't know whether Mr. Weintraub saw it or not? A. No, it was directly behind him; he couldn't have seen the chair.

. . .

[50] *Cross examination:*

. . .

[51] Q. I see. You saw Mr. Weintraub pass a number of times? A. That is right.

Q. About how many, would you say? A. Three or four times.

Q. Three or four times? A. That is right.

Q. That three or four times was during what interval of time? In an hour? Two hours? Three hours? A. From 9:15 to 10:10.

Q. From 9:15 to 10:10? A. That is right.

Q. And each time that Mr. Weintraub passed you, you were standing at the door? A. That is right.

Q. Were you standing with anyone? A. No. It was just at 10:10 that he caught me with girls, so he claims.

. . .

[56] JOHN K. LAPHAM (Respondent's witness).

. . .

[57] *Direct examination:*

Q. (By Mr. Levy) Mr. Lapham, you are the business agent for the A. F. L. Local No. 3? A. The International Brotherhood of Electrical Workers No. 3, yes.

[58] Q. With whom do you have most of your dealings at the company? A. Mr. Weintraub.

. . .

[59] Q. And your relations with Mr. Weintraub were what? A. We have gone along all right on union questions.

. . .

Q. In order to clarify your answer, Mr. Lapham, when you say "fair," do you mean the labor relations have been fair labor relations in the sense of fair and just; is that what you meant, or did you mean something different? A. No, I mean any time we had agreements or disagreements, we sat down with Mr. Weintraub and it was straightened out to our satisfaction.

Q. Mr. Lapham, did you file a charge in behalf of Mr. Chairman with this Board? A. Yes, I did.

Q. That was on about January 28, 1944. I show you [60] Board's Exhibit 1 and ask you if you filed that charge? A. Yes, that is my signature. I signed that.

Q. Did you subsequently withdraw that charge? A. Yes, I withdrew it; I don't know just what time.

. . .

[69] Q. You withdrew it with the approval of the union membership in the shop? A. Yes, that's right.

. . .

[70] Q. (By Mr. Levy) Mr. Lapham, when you were discussing with company representatives the question of your representing the maintenance workers, did you discuss the matter with the [71] top executive in Universal Camera, Mr. Shapiro? A. Yes, I did.

Q. What did he say to you? A. He would not recognize us. He told me that there was a union in the field and I maintained that the union did not cover the maintenance men. They were excluded, and his answer to me was, "Let the National Labor Relations Board decide who was the bargaining unit for your men. You will have to be certified by the Board."

Q. Did he say to you that he had no interest in the outcome one way or the other? A. He made that as a statement on the stand. That is in the minutes.

[73] Q. (By Mr. Levy) Mr. Lapham, I understand, then, that your testimony is that if you thought this was a good charge, it would have been your duty to press it, and your testimony further is that Mr. Zicarelli was the most active union man in the shop? A. Yes.

[74] Q. (By Mr. Levy) Did you talk with any representative of this company about withdrawing the charge before you withdrew it, Mr. Lapham? A. No, I did not.

Cross examination:

Q. (By Mr. Macht) When did you get your union contract with the company? A. I would say a few months after; the election was held February 26th. I think it took a month to be certified, which would be around March. I would say around April.

Q. Of what year? [75] A. April, the election was held on the 11 of March, 1944—can I refresh my memory?

Q. No, I want your memory.

Trial Examiner Feiler: Do you have any recollection now as to the date?

The Witness: I would say in March of 1945.

Trial Examiner Feiler: In March of 1945?

The Witness: Wait a minute. The election was held February, 1944. It would be March, 1944.

[76] Q. I want you, Mr. Lapham, to recall as much as you can, not just a part that may be more pertinent to you than to someone else.

What did he say about being fired because he gave testimony. A. He explained to me, and I spoke to the men,

and I found over the years there have been men who were more active than he and had not been fired, who testified in our behalf [77] and were very active.

[109] IMRE CHAIRMAN (Board Witness).

Direct examination:

[112] Q. Do you recall when the International Brotherhood of Electrical Workers, Local No. 3, commenced organization at [113] the plant? A. Around the time when I entered the company, September, 1943.

Q. Is that the best of your recollection? A. Yes.

Q. In the early part of November of 1943, did you have a conversation with Mr. Politzer concerning your joining that union? A. I had.

Q. Where was the conversation? A. In front of the maintenance office.

Q. Tell us what was said by you and what was said by Mr. Politzer. A. I told Mr. Politzer that the men asked me to join the union and I would like to have his opinion. Mr. Politzer said "The company has no objection against the union but of course, as an engineer, if I were in your place, I would not join."

So I said, "All right, I will take your advice", and then I told the men I am not going to join the union because Ben Politzer told me I should not.

[173] Q. Did Mr. Politzer go down to see Mr. Weintraub? A. So Mr. Politzer told me later.

Q. Could you tell us about what part of January, 1944 it would be that you had another conversation with Mr. Politzer? A. It might have been the 11th or 12th of January.

[174] What gave rise to your saying that? A. Mr. Politzer kind of asked whether I would not consider to resign, and I said no.

Q. What did you say when you said no? A. I never quit under fire.

Q. What did Mr. Politzer say about that, if anything? A. He said, "It is all right with me because I don't want to fire you."

Q. Was anything said about your work? A. He said he is satisfied with my work and I am doing all right. I never refused any of his orders. The next day when he came, all the work that was required was done. He saw that I was useful to him and I did my engineering duties just like Harry, who was an exemplary engineer, and he was satisfied.

. . .

[180] *Cross examination:*

. . .

[226] Q. Will you tell us the first place that you sought employment after you left Universal Camera, please? A. In May, 1945, until the latter part of November.

Trial Examiner Feiler: What year was that now?

The Witness: 1945.

Trial Examiner Feiler: You were discharged in 1944.

The Witness: 1944, and a year and some months later I had another job.

Trial Examiner Feiler: I think you misunderstood counsel's question. It was not where you actually did obtain employment, but where was the first place, I think he wants to know, where was the first place and when, that you applied for a position after your discharge, whether or not you received an acceptance.

The Witness: With the United States Employment Office.

[227] Q. (By Mr. Levy) The United States Employment Office? A. Yes.

Q. You were discharged on January 25, 1944, is that correct? A. Right.

Q. And you went to the United States Employment Service about what date, sir? A. Two weeks later, around the middle of February.

Q. And you made out an application there? A. Yes.

Q. For what kind of employment, Mr. Chairman? A. As an engineer.

Q. Were you asked why you had left your place of employment? A. Yes.

Q. On the application blank? A. Yes.

Q. What did you reply? A. "Misconduct."

. . .

[285] Q. Did you ever ask him for a release? A. No.

Q. Did you know that you were entitled to a release under the law? [286] A. I should have.

Q. Did you? A. I was entitled—

Q. Did you know that? A. Yes.

Q. Why didn't you ask him for it? A. Because I wanted to have a bearing whether Mr. Weintraub can fire me and conduct himself like he did, whether he can kick people around who want to work for the war effort and whether he can do what he did there and whether he can tell the War Department to back him up if he kills me.

Q. So you would prefer to do that rather than get a release and work in another plant? A. No, I wanted to see that people who are so overbearing should be put in their place.

. . .

[301] *Redirect examination:*

. . .

[309] Q. In answers to Mr. Levy's questions of you on cross examination, you stated to the effect, I believe, that

on January 25th, 1944, you asked Mr. Weintraub to put your discharge in writing? A. I did ask.

Q. Did he do so? A. No, and he denied me any kind of a written statement or letter, anything in writing.

Q. Did you feel that it would do you any good to ask him again for a discharge in writing? A. He was in such a state of animosity that I saw that the next step will be he calls in the guards and let me be [310] thrown out the window by the guards. And, after I was fired, I had no right to stay in that factory.

Trial Examiner Feiler: Did he amplify his statement to you about misconduct? I think you testified that he said you were discharged for misconduct; isn't that right?

The Witness: Yes.

Trial Examiner Feiler: Did he amplify it and tell you what he had in mind?

The Witness: When I asked—no, I asked first, what was my misconduct. He didn't even answer. That is why I then said, "For your misconduct, you fire me. So long." And I went out.

[396] HARRY GOLDSON (Board Witness).

Direct examination:

[418] Q. In one of your answers you have stated that you were present, as I recall, part of the time at an incident between Mr. Kende and Mr. Chairman, is that correct? A. That is correct.

Q. Would you tell us where that took place and to the best of your recollection what was said? A. I don't remember whether it was after the first hearing or the second

hearing. It was during the evening. I stayed late. I was working late and I was going home. Mr. Chairman was going out for supper and there were several other people there. I don't recall their names.

. . .

[421] *Cross examination:*

Q. (By Mr. Levy) Mr. Goldson, did you ever overhear a conversation between Mr. Kende and Mr. Shapiro about any of these matters? A. No, I didn't.

Q. Were you in the hearing room when Mr. Chairman testified? A. Yes, I was.

Q. I read to you, Mr. Goldson, a question asked by counsel of Mr. Chairman and Mr. Chairman's answer:

"Q. Did he say—

Trial Examiner Feiler: Excuse me. You might indicate the page number.

Mr. Levy: At page 146 of the record.

Q. (By Mr. Levy) Referring to you, Mr. Goldson, "Q. Did he say whether or not he had overheard any conversations of Kende?" and Mr. Kende's answer:

"A. Yes, he said that he overheard a conversation —" —he meaning you, Goldson—" —of Kende and Shapiro, that after this hearing they are going to see that they find a pretext to fire me."

Do you remember hearing Mr. Chairman saying that?

A. Yes, I do.

Q. Is that true, Mr. Goldson? A. What?

Q. Is that a true statement, Mr. Chairman's statement, is [422] that a true statement?

. . .

A. I don't think I ever told him.

. . .

Q. (By Mr. Levy) Mr. Goldson, let us go over it again. Did you ever hear a conversation between Mr. Kende and Mr. Shapiro? A. No. I was never in a position to hear any conversation between them.

Q. Did you ever hear one? A. No.

Q. Did you ever overhear a conversation between Mr. Kende and Mr. Shapiro after that hearing that they were going to find a pretext to fire Mr. Chairman? A. No, I did not.

[423] Q. Did you hear Mr. Chairman say that you told him that you overheard such a conversation? A. Please?

Q. Did you hear Mr. Chairman when he was on the witness stand and you were in the hearing room did you hear him say that you told him that you overheard a conversation between Mr. Kende and Mr. Shapiro that after this hearing they were going to see to find a pretext to fire Chairman? A. I did.

Q. You heard Mr. Chairman make that statement? A. I did.

Q. Is it a true statement?

. . .

A. No. I never overheard the conversation.

. . .

[457] Q. (By Mr. Levy) Mr. Chairman said you told him before he came down to testify that the company knows he is with the men.

Do you remember making such a statement to Mr. Chairman? A. I can't recall the exact words of any statements I made to Mr. Chairman.

Q. Did you make a statement to that effect to Mr. Chairman? A. I can't recall the exact words I used in any conversation with Mr. Chairman at that time.

Trial Examiner Feiler; Counsel is asking you if you said anything to that effect to Mr. Chairman, that is, in substance,

The Witness: Very possibly I did. I repeat that the entire trend of the conversation was along that line.

Q. (By Mr. Levy) Well now, will you tell us to the best of your ability what you can now recall about what you said to Mr. Chairman? [458] A. At which point?

Q. Prior to his coming down to testify at those representation hearings? A. I think I answered that question before when I said I didn't know whether I told him before the first hearing or between the first or second hearing that it would not do him any good to go down and testify.

[459] Q. (Continuing) Mr. Macht asked him whom did he say, meaning you—it would not do any good and then Mr. Chairman replied after a lot of leading by counsel, after counsel leading him "With Mr. Shapiro" and then it went on:

"Mr. Macht: Did he mention Shapiro's name?"

"A. Yes."

Now, Mr. Goldson, I ask you did you ever tell Mr. Chairman it would not do him any good with Mr. Shapiro if he came down and testified, mentioning Mr. Shapiro by name? A. No, I don't think I mentioned Mr. Shapiro by name, but Mr. Shapiro and the company are almost synonymous. If I mention the company it is Mr. Shapiro. If it is the company it is Mr. Shapiro.

[466] JOSEPH EUGENE ZICARELLI (Board witness).

Direct examination:

[477] Q. (By Mr. Macht) Then after both said that what, if anything, happened? A. Well, see when I first got wind of this was when Mr. Weintraub said, "Hey, shop steward" I was walking toward the emory room. That was around

eleven o'clock or eleven ten [478] o'clock and I was going to close the emory windows. You know it was like a holiday, like New Year's day or so; before New Year's on the 30th and Mr. Chairman and Mr. Weintraub must have been arguing in a loud voice when I went by. Then when I settled the trouble, this trouble with them then I had to go back to my duty of still closing the emory room because I had devoted my time that I had to close the windows settling this discussion between Mr. Weintraub and Mr. Chairman.

. . .

[481] *Cross examination:*

. . .

[495] Q. Did you see Mr. Weintraub dial the telephone?
A. Yes, I did.

Q. And did you see him leave? A. Yes, I did.

Q. As he went out, did he say anything to you? A. I don't know if he said it to me or if he said to all of us. "I will show you if any one can call me drunk." Something of that sort. "I will show you if anybody can call me drunk."

. . .

[544] GEORGE KENDE (Respondent's witness).

. . .

Direct examination:

. . .

[545] Q. Mr. Kende, on November 30, 1943, you testified in the representation proceeding? A. I did, yes.

Q. Would you tell us, please, how you happened to come down to the Board to testify in that proceeding? A. Yes, approximately noontime, 12 o'clock, the same day, I met Mr. Shapiro who was either coming or going into the building.

Q. Who is Mr. Shapiro? A. He is vice-president of the company.

Q. Yes? A. And he hurriedly gave me a slip of paper with an address, a downtown address on it, and asked me

to be down there at 2 o'clock or 2:30, I forget which, and to bring Mr. Politzer with me. He did not explain what he wanted me for or what the nature of the hearing was, except perhaps he might have said it is a labor hearing. I don't know that. I have no knowledge of why.

Q. At that time did you know what the issues were in that case? A. I did not.

. . .

[548] Q. I will reframe it.

When you were down at the hearings to testify, Mr. Kende, did you have any conversation at that time or at [549] any time before you happened to have this conversation with Mr. Chairman? Did you have any conversation with Mr. Shapiro? A. I talked to Mr. Shapiro at the hearing, but not regarding Mr. Chairman.

Q. Did you discuss Mr. Chairman's testimony with him? A. No.

Q. Did you discuss his attitude toward the men who were testifying? A. No.

. . .

[550] Q. Did Mr. Shapiro or any other executive of the company or counsel for the company or any official of the company, any other official of the company, ever say anything to you on that day concerning their attitude toward the men who were testifying? A. No.

Q. Did you regard it as inappropriate for an employee to testify in a hearing of this kind? A. No, I did not.

Q. Did you have any feeling against an employee who might testify at such a hearing or who did testify at such a hearing? A. I have testified to that, no.

. . .

Q. And that his statements were not in accord with the facts? A. Yes, I am in a position to give specific instances of [551] what I thought.

Q. And that is the reason you stopped him on the staircase, to discuss the facts with him? A. Yes, I wish to ex-

plain that it was not a matter of difference of opinion but rather a difference as to statements of fact and I simply could not understand his making certain statements, and it bothered me after the conclusion of the testimony, and I made a mental note to see Mr. Chairman about that at some convenient future time, and it was quite accidental that I ran into him on the stairs and I thought, "Well, we might as well find out now what the basis of this difference of opinion is."

Q. So he declined to discuss the facts with you? A. He did.

Q. And instead he proceeded to make those remarks about engineers and called names? A. That is correct.

. . .

[552] Q. Did you do anything further with respect to that incident or Mr. Chairman? A. Not that evening.

Q. Was it the next day? A. I believe it was the next day. I don't remember whether it was Sunday or not, but the very next work day I asked Mr. Politzer to come into my office.

Q. For what purpose? Go slowly, please. A. For the purpose of finding out more about Mr. Chairman.

Q. Why did you want to find out more about Mr. Chairman? A. Because the first time I had seen him was at the hearing. The second time I saw him was at the staircase.

Q. You mean the first time in your life you had seen him? A. Yes, knowingly. I may have passed him by in the hall and not known who he was.

Q. But identifying him as a personality in the plant—
A. Was that afternoon, and after all, this man stated on the witness stand that he was an engineer, a maintenance engineer. I did not know that. I later met him on the staircase and he had an altercation with me. I was determined to find out more about this man, his qualifications [553] and so forth.

. . .

[560] Q. (By Mr. Levy) After you finished your conversation with Mr. Chairman, Mr. Kende, how did you then feel about Mr. Chairman?

. . .

The Witness: That is a broad question and I can only answer it broadly. I felt here was a man who, as I found out that afternoon, had been only with us approximately four or five weeks.

. . .

[561] A. Because after his testimony I was still wondering who he was and I asked one of our men who was at the hearing. It might have been a maintenance mechanic, I asked him who this man was and the man said he was the maintenance engineer.

Q. I see. A. And I repeat, here is this man who had been with us only a few weeks, in a responsible position, in charge of one shift of maintenance mechanics, who seemed to be; I was quite certain of this, seemed to be either ignorant of the true facts regarding the organization within the company, responsibility of employees of supervisors or if that was not the case, that he was deliberately lying, not in one instance but in many instances, all afternoon.

I felt, therefore, that there was definite doubt regarding his suitability for a supervisory position of that nature.

. . .

[566] Q. Why did you ask Mr. Politzer to keep an eye on his work, Mr. Kende? A. Because there was a distinctly unfavorable impression that the man gave me on the staircase, and because of his violent reaction to reasonable discussion.

The records were handed back to Mr. Weintraub. There was no investigation made of the man's references such as they were or anything further. There was no further investigation made by me or Mr. Weintraub.

Q. No further report was ever brought back to you?
A. I didn't ask for it.

Q. Mr. Politzer told you the man's work was satisfactory? A. Yes.

Q. Mr. Weintraub told you the fact that he was a Communist did not make any difference? A. That's right.

* * *

[567] Q. That was the end of the incident as far as you were concerned? A. Yes.

* * *

[568] Q. (By Mr. Levy) Mr. Kende, I direct your attention to the incidents that occurred on December 30 that were testified to here during these hearings. A. December 30 or December 31?

Q. December 30. It was the night before New Year's. You heard testimony that Mr. Kollisch, maintenance mechanic working under Mr. Chairman's direction was standing out in the hallway, did you not? A. Yes.

Q. Will you tell us, Mr. Kende, if there was any practice or rule of procedure in the plant or any direction or instruction of yours which bears upon that fact or circumstance?

* * *

[569] A. The directions which I will tell you, cover not only employees standing in the hallway, but are even more general than that. This was wartime production and there was a shortage of men.

Q. More slowly, Mr. Kende. A. Particularly maintenance mechanics. We had a lot of machinery. Our repairs man was always behind schedule. There were always machines broken down. We could not afford to have any maintenance mechanics idle at any time. Therefore, Mr. Politzer had specific orders never to permit any loitering of maintenance mechanics in the hallways or being idle for a single moment, because if there was no machine immediately to be repaired in the various machine rooms, there was always a stack of work in the little maintenance shop or the maintenance repair shop.

Therefore, if the full quota of maintenance mechanics [570] was not busy on the floor repairing machinery, they were to be in the maintenance machine shop attending to the accumulation of repair jobs.

Q. (By Mr. Levy) Mr. Kende, there was always enough maintenance work so that there was a backlog, and so that there would never be any occasion for any man remaining idle. A. Never.

Q. Was there any rule or regulation or instruction of yours relating to men standing in the doorway? A. Not specifically. The general rule regarding men being kept busy, adequately covered it. Obviously, you are not busy if you are standing in a doorway.

Q. And you were then doing war work at the plant?

A. We were then doing war work.

Q. (By Mr. Levy) And you were working in how many shifts? A. Three shifts.

[571] Q. Mr. Kende, did you ever at any time have a conversation with Mr. Shapiro about Mr. Chairman? A. Never.

Q. Did you ever have any—I withdraw that.

Did you hear Mr. Chairman testify that Mr. Goldson told him that he overheard a conversation between you and Mr. Shapiro concerning Mr. Chairman? A. I heard Mr. Chairman testify to that, yes.

Q. Did you ever have such a discussion? A. Never.

Q. Mr. Kende, in the course of his testimony Mr. Chairman, in giving his version of the conversation on the staircase with you at pages 133 and 134 of the official transcript said:

“Mr. Kende came and he yelled at me. ‘You and your men perjured yourselves. The company does not expect you to go down there and testify against them. The company expected you to work here.’”

Did you use those words, Mr. Kende?

A. With reference to the perjury, I have already made a [572] statement on that.

Q. That you did say you thought he had perjured himself? A. Yes, that is the only part of that sentence or quotation that is correct.

Q. Did you say, "The company does not expect you to go down there and testify against them"? A. No, I did not.

Q. Did you say anything like that? A. Nothing that could be construed in any fashion to mean that. No, sir.

Q. Did you have any reason to expect that that was the company's attitude? A. None whatever.

Q. Is that in fact the company's attitude? A. I don't know what the company's attitude would be if the company does have an attitude.

• • •

[574] Q. (By Mr. Levy) What was Mr. Weintraub's functions in [575] the company in the latter part of 1943 and the early part of 1944? Was he then personnel manager? A. Yes.

Q. If you know, will you tell us what his duties as personnel manager were? A. He had charge of the staff, consisting of the clerical staff and armed guards which were maintained for the security of the plant, and with respect to his office staff, his duties were to advertise or otherwise obtain applicants for employment, interview them, assign them to various positions which were open, and which he knew were open, because he had personnel requisitions from the various departments to fill various open jobs.

• • •

The Witness: His functions were to hire employees and under certain circumstances involving general discipline and security also to fire.

Q. (By Mr. Levy) What do you mean when you say, "security," Mr. Kende? A. Over-all plant security, which

meant the safeguarding of production machinery, the whole plant which was operating for the war and Navy Departments.

Q. You used the word security in connection with the fact that the plant was doing war work? A. Yes.

. . .

[576] Q. (By Mr. Levy) Mr. Kende, did you order Mr. Chairman fired, because he gave testimony at that representation proceeding? A. I did not order him fired for any reason whatsoever. I did not order him fired. The answer is no.

. . .

Q. (By Mr. Levy) Did you suggest to anyone at any time that he should be discharged because he gave testimony at that representation proceeding? A. No.

Q. Did you suggest or recommend to anyone that he should be disciplined because he gave testimony in that representation proceeding? A. No.

[577] Q. Did you recommend or suggest to anyone that he should be watched because he gave testimony in the representation proceeding? A. No.

. . .

[585] Q. (By Mr. Levy) After Mr. Weintraub and Mr. Politzer left their office that day, as you testified the last time you were on the stand, Mr. Kende, did you do anything further about Mr. Chairman? A. No.

Q. Did you ask Mr. Politzer how his work was coming along? A. No, I had no occasion to.

. . .

[593] *Cross examination:*

. . .

[614] Q. And the technical classification the company used for people like Mr. Kende? [615] A. Mr. Chairman, you mean?

Q. I mean Mr. Chairman and Mr. Goldson.

. . .

A. Mr. Chairman and Mr. Goldson and one other man were classified either as junior engineers or assistant maintenance engineers.

. . .

[619] The Witness: I think the question was whether I thought he was a Communist.

Q. Yes, sir. A. The answer is yes.

Q. What did you base that on? [620] A. Based almost entirely on my encounter with him on the staircase the night before.

Q. It wasn't based on his application for personnel records? A. No. Even before I saw the record, the impression he made to me on the staircase the night before was that which in my opinion corresponds to a Communist. That was my opinion.

. . .

[630] Q. You have time cards, don't you? A. There were time cards, yes.

Q. Did you look at his time card? A. I?

Q. Yes. A. No.

Q. Did you ask to see his time card as to whether or not he was removed? A. No, it wouldn't occur to me to look at his time card.

Q. If he was removed from the plant? When did he say he was removed from the plant? A. To answer your question: If our personnel manager says a certain man was removed from the plant, I don't have to look at the time card to be sure that he was.

. . .

[636] Q. Did any one ever designate Mr. Weintraub to discipline people directly responsible to Mr. Politzer and you? A. He had general directions which covered all departments including—

Mr. Macht: Would you read that answer, please?

A. Including departments under my supervision.

Q. From whom did those directions come? A. They came from one of two sources, one of three, I should say, and they may have come and would normally come from—

Q. Don't tell me "may have," Mr. Kende, please. A. They did come always from the general manager of the company, also from the vice president of the company, Mr. Shapiro, or from the president of the company, Mr. Githens.

Q. Who is the general manager? A. The general manager at the time was Mr. Case.

[641] *Redirect examination:*

Q. You testified in answer to one of Mr. Macht's questions that your conception of Mr. Weintraub's duties—you testified [642] that among Mr. Weintraub's duties, as you understood it, at that time was general discipline. What did you mean by that? A. I meant that I knew that the guard was under his direction. Further, I knew that he was the man most active in our company in handling labor relations. Further, I knew that on any and every special occasion, such as holidays, when there are special crews in, or on days or evenings preceding holidays, such as Christmas or New Year's Eve, when a greater or lesser amount of boisterousness may be expected in the plant, Weintraub had specific instructions regarding maintenance of order and discipline.

Q. Mr. Kende, you have testified that some time in January of 1944, when Mr. Politzer and Mr. Weintraub came to your office on the occasion of Mr. Weintraub's wishing to have Mr. Chairman fired, that Mr. Politzer was questioning his authority; is that correct? Is that what you testified? A. Yes.

Q. And you said that you told Mr. Politzer that in those circumstances Weintraub had the authority; what did you mean by that? A. I meant by that that since the occasion on which this happened was one of those specific days on which I knew Wein- [643] traub had instructions from Mr. Githens or Mr. Shapiro to maintain order and discipline in the plant, that he was perfectly justified in acting as he did, particularly because the man accused him of drunkenness which would tend to destroy his authority, and particularly as I knew that the man was never drunk.

Q. Mr. Kende, you have testified that as a result of the incident your meeting Mr. Chairman on the staircase later in the day of the hearing, November 30th, that the impression he made on you was that he was a Communist. Would you tell us what you mean by that? A. Well, in a reasonable discussion of the truth or untruth of the facts, he started to accuse me of not helping the workers, not helping the common man, the working man; he said that I never done anything for the men, despite the fact he could have known very little of what I may have done for the men during the preceding seven years of my work; and then, he started to say something about my professional qualifications.

I was, he said, completely disregarding any value of truth or respect for authority for the sake, as he put it, of helping the working man. To me that meant Communism.

. . .

[644] Q. So that after the conference in your office on the [645] first working day after November 30, 1943, you personally did nothing further to check on Mr. Chairman? A. Nothing.

Q. And you took no steps whatsoever with respect to disciplining him? A. No, I did not.

Q. Or discharging him? A. I did not.

. . .

[664] *Redirect examination:*

[749] SAM PEARL (Respondent's witness).

Direct examination:

Q. In late 1943 and early 1944, were you employed at the Universal Camera Corporation? A. I was.

Q. In what capacity, sir? A. As an assistant general foreman of optical processing.

[750] Q. Were you in the plant on the night of December 30, 1943? A. I was.

Q. On that night, where did your duties take you on that floor? A. All over the whole floor. There was no particular spot.

Q. During that night, did you observe any events involving Mr. Chairman? A. I did.

A. Well, going about my duties from time to time from department to department, at one time in the hall I have seen Mr. Weintraub and this Frank Kollisch arguing. I knew they were arguing by what I overheard Frank say to Mr. Weintraub.

[751] Q. What was that? A. "You are not my boss. I don't have to take orders from you." With that they went to the rear to Mr. Politzer's office where Mr. Chairman was.

A. So it must have been about fifteen minutes later, I went toward the rear where Politzer's office was and Mr. Weintraub and Mr. Chairman were in the office there with Frank—Frank came out of the office then and was walking toward the shop.

Q. Frank Kollisch? A. Frank Kollisch. And I saw an angry look on Mr. Weintraub's face and I asked him what seemed to be the trouble. "I will show him who he is calling drunkard."

. . .

[755] Q. Did you say anything to Mr. Chairman that evening? A. No. I didn't particularly talk about anything to him.

Q. Did you say anything to him? A. Well, Weintraub was going down after he tried to call up, and I did say, "Mr. Chairman, did you call Mr. Weintraub a drunkard?" He said, "Yes, he is."

Q. Did you make any comment on that? A. No, I just kept quiet.

Q. Did you observe Mr. Weintraub that night? A. On several occasions.

Q. Was he drunk? A. Not to my knowledge. He didn't look that way to me. He wasn't drunk as far as I am concerned.

. . .

Q. Have you ever been instructed that the plant was working under security orders of the War Department? A. Would you repeat that, please?

Q. Had you ever been instructed that the plant was working [756] under security orders from the War Department? A. Yes.

Q. Had you ever heard anything from Mr. Weintraub about that? A. Particularly that day, I did. At the beginning of the shift, when they were coming on at four o'clock, the usual slips were on our desk that we had inside there, the foreman's desk, to all department heads. It was specially notifying us on that night if any one was caught with any bottles or were drunk, they were subject to dismissal.

Q. There was such a notice? A. Yes.

Q. Who was it signed by? A. By Mr. Weintraub.

Q. Did you see Mr. Weintraub often that night? A. I did.

Q. What was he doing? A. He was going from time to time in all departments, looking around to see that everything was in working order.

[795] IRVING WEINTRAUB (Respondent's witness,

Direct Examination:

Q. I see that you are not shaved, Weintraub, and that you look a bit tired. Weren't you home last night? A. No, I have been working all night.

Q. Working all night? A. All night.

[796] A. Well, I would prefer an adjournment, but we might just as well finish this off.

Q. Mr. Weintraub, you are employed at Universal Camera Corporation? A. Yes.

Q. In what capacity? A. Personnel manager.

Q. Were you personnel manager in 1943 and 1944? A. Yes.

Q. At a time previous to your employment by Universal Camera Corporation, were you employed by New York University? A. I was.

Q. In what capacity? A. Administrator of the Student Work Program.

Q. That was also a personnel job? A. That is right.

Q. And you have been a personnel manager for many years? A. That is true.

Q. In late 1943, and 1944, Mr. Weintraub, was the Universal Camera Corporation engaged in war production? A. They were.

Q. On a considerable scale? A. Very considerable.

[797] Q. And did you have auxiliary military policemen at the plant? A. We did.

Q. And under whose jurisdiction did they work? A. Mine.

. . .

[798] Q. Did all your employees have to wear badges? A. All the employees did.

. . .

[801] Q. Excuse me. Is this something you told Zicarelli? A. That is right.

Q. You told Zicarelli? A. Yes.

"No member in an executive position in the company can permit any employee to call him drunk and still retain their authority over the rest of the people."

Mr. Weintraub, were you drunk that night? A. Definitely not.

. . .

Q. What happened the next day with respect to that incident, the next working day? A. I saw Mr. Politzer, the engineer in charge of the maintenance mechanics in the optical department, Mr. Politzer, who is the engineer in charge of the maintenance mechanics in the optical department, and told him about the incident that happened to Chairman. Mr. Politzer told me that he knows about it, Mr. Chairman had been in to see him and told him that he was resigning and would leave within [802] ten days or two weeks.

I told Mr. Politzer if that is the case, I will not press the matter at the moment, but to be sure that he is out at the end of two weeks.

. . .

[804] Q. But you remember his appearing at your office? A. That is right.

Q. And what happened? A. I asked him to return the badge he had.

Q. What badge was that? A. The badge we give each employee which has a picture, the number of the employee, the color of the department. Each department had a different color. And if the guards found anybody in the depart-

ment without the proper color, he would want to know why. We were required by security reasons to do that.

Q. I see. A. He refused to return the badge. I said if he does not return the badge he cannot receive his pay until he does so. That badge is our property. And he walked [805] out in a huff.

. . .

[812] Q. (By Mr. Levy) Mr. Weintraub, will you tell us a bit more about the policy of your office and of the company with respect to releases? A. When a man is fired or laid off, as soon as a termination notice reaches my office, the girl automatically sends in a notice to the payroll department taking him off payroll, asking for his money up to date, and types up the release. If a person quits of his own accord, the girl will come in and ask me whether she should make out a release or not.

Q. If he is discharged? A. Automatically made out by the girl.

Q. Was that pursuant to the policy of the company or pursuant to any rule or regulation of the War Department or the Government? A. We are required by rules and regulations of the War Manpower Commission to give releases to all people discharged or laid off.

Q. And it was your invariable policy to do so? A. That is correct.

. . .

[826] Q. From that time, up until the day of Mr. Chairman's dis- [827] charge, did you ever discuss Mr. Chairman with Mr. Kende? A. I did not.

Q. Did you discuss him with Mr. Politzer? A. I did not.

Q. Did you discuss it with any executive of the company? A. I did not.

Q. Did Mr. Kende say in that discussion that he was out to get Chairman for having testified? A. He did not.

Q. Was anything remotely like that said? A. There was not.

Q. Is there anything like that in your mind? A. Absolutely none.

. . .

[828] *Cross examination:*

. . .

[844] Q. (By Mr. Macht) Mr. Weintraub, did Mr. Kearns explain to you that he wanted the time cards on Chairman for the night of December 30, 1943, because he wanted to ascertain the time Chairman quit work that night? A. He did not. We had never refused any of our records to official representatives of the Government.

. . .

[849] Q. Did anyone question you the following day concerning whether or not you were drunk on the night of December 30th? A. No.

Q. Had you been drinking that night? A. I did not.

Q. Hadn't you had any drink at all? A. No.

. . .

[857] Q. Do I understand that you never told Mr. Kende at any time that Mr. Politzer was to get Chairman's resignation?

. . .

[858] A. Nobody was instructed to get Mr. Chairman's resignation. Therefore, there was no need to discuss it with anyone.

Q. (By Mr. Macht) Did you ever tell Mr. Kende that you were going to get Mr. Chairman to resign? A. Is that the same question, sir?

Trial Examiner Feiler: I don't know. You answer that as you understand it.

The Witness: I will repeat: It is my same answer. I never instructed nor did anybody ever instruct anybody to get Mr. Chairman to resign; therefore, there was no need to discuss it with anyone.

Q. (By Mr. Macht) Did you ever tell Mr. Kende that you were going to get Mr. Chairman to resign?

A. The same answer as before.

[859] The Witness: No.

Q. (By Mr. Macht) Did you ever tell Mr. Kende that it was understood that Mr. Politzer was to get Mr. Chairman to resign? A. No.

Q. (By Mr. Macht) And why did he say he wanted to keep [860] Mr. Chairman? A. He was satisfied with Mr. Chairman's services.

A. Mr. Politzer said that Mr. Chairman, he was satisfied with Mr. Chairman's work, and he wanted him to stay. I said, "Definitely, no. He leaves."

Q. What else did Mr. Politzer say? A. He wanted to see Mr. Kende and find out whether he was going to leave on my sayso.

Q. Then what did you do? A. We went into Mr. Kende.

[862] Q. Isn't that what Mr. Chairman told you, that he would not discharge Mr. Kollisch, but that Mr. Politzer was his boss and that you would have to see Mr. Politzer? A. We did not discuss the discharge of Mr. Kollisch. We discussed what was the man's duties. That was my question. "What is this man supposed to be doing tonight?"

[864] Q. You told Mr. Chairman to send him home, didn't you? A. I did not.

Q. What did you tell him to do with Kollisch? A. Just keep him out of the hallway. I didn't get the chance to

tell him what to do with Kollisch. I wanted him kept out of the hallways.

. . .

[873] A. I told Mr. Politzer that I had put him out of the building and that he would not return. He would be discharged.

Q. Did Mr. Politzer change your order that morning?

A. No, he said Mr. Chairman was in, and had resigned.

Q. What did you say? A. Being an engineer he has to turn his papers over. I agreed, providing he would leave at the designated time.

Q. Did you agree because you did not want anything to go on to his record as improper?

. . .

A. Well, there may have been two reasons why I agreed.

Q. (By Mr. Macht) Just tell us what the reasons were at the time, and not now.

. . .

[874] The Witness: At that time, there were two reasons that figured in my decision. One, being an engineer I realized that he could not turn his papers over and his work over to somebody immediately like an ordinary factory worker could.

Second, we had made it a policy, wherever [875] possible, not to give out bad references. We tried as hard as possible not to give out bad references.

. . .

[884] Trial Examiner Feiler: Let us have a one-hour luncheon recess now. I want both counsel to return here in an hour, to discuss this question of records, which counsel for respondent offered to discuss before, and which we deferred, and at the end of that time, I will be back here then, too, although I would not stay in the hearing room while you discuss those records, and as soon as you finish [885] your

conference on that, why, I want you to tell me what the status is.

[886] Mr. Levy: I will tell you everything I know, Mr. Examiner. I told the examiner I would produce whatever records we have, and I asked to have the company telephoned to produce the records. This morning I arrived here shortly before nine-thirty, and spoke to Mr. Weintraub a minute or two, and did not have a moment to go into the question. He told me some of the records are in the warehouse. That is all I know.

Trial Examiner Feiler: What is the situation on those time cards of December 30th and 31st, 1943?

Mr. Levy: You know as much as I do about it, sir. We will have to talk with Mr. Weintraub about it. If you wish to talk with Mr. Weintraub, I am perfectly willing to have you do so.

Trial Examiner Feiler: You know, Mr. Weintraub, that there has been a request made here for certain time cards, for December 30th, and December 31st, 1943. What is the situation on those?

The Witness: They are in the warehouse. Which ones, I don't know. We would have to check. We would have to get our payroll department to check that. Am I to understand, Mr. Macht, that you want the time cards of everybody who worked that day?

Mr. Macht: Only the production workers in the [887] optical department, that Mr. Pearl super ses, or the following shift.

[896] Trial Examiner Feiler: I will overrule the objection. I will say this, though: the company, as far as I can see, is making an effort to cooperate in the production of papers and records. It is quite late in the hearing, or, at least, I hope it is, and I

think it is incumbent on Board's counsel to bring the matter of the production of records to a head and determine as soon as possible what he might need for determination of this hearing so that the company can have an opportunity to search for any records it has to bring [897] down. If you don't anticipate others, why, that is all right.

Mr. Macht: Mr. Examiner, just as soon as certain things are developed, I think the records will show better than the type of testimony that was given on them. I most certainly feel that I should ask for those records. It is in pursuance of that that I have throughout this hearing called for certain specific items.

Trial Examiner Feiler: We needn't go into that further. I am merely saying, if you can anticipate any documents, ask for them in advance. I think the respondent would even prefer that you ask for some matters now that you wouldn't really use later, rather than bring it up later.

Mr. Levy: Yes. You know, Mr. Examiner, the question of how far you want to go is entirely up to you. As far as the company's position is concerned, we will produce everything we have that is asked for.

[933] SAM HRABLOOK (Respondent's witness).

Direct examination:

Q. Were you employed by the company in 1943 and 1944? A. Yes, I was.

Q. In what capacity? A. Maintenance Mechanic.

[934] Q. Are you now the shop steward? A. That is right.

Q. For those maintenance men? A. Yes.

Q. When did you become shop steward? A. It was around July, I think it is around July, 1944.

Q. And as shop steward, is it your job to take up grievances? A. Yes, sir.

Q. Whom do you take them up with? A. Mr. Weintraub.

Q. Will you tell us, Mr. Hrablook, what your experience has been with taking up grievances with Mr. Weintraub?

[935] A. Well, since I have been shop steward, we have never had any trouble. As many grievances as we have had up there, they have always been settled there and all have been settled. Mostly, in our favor, they have been settled.

[936] Q. Mr. Hrablook, as a maintenance man, were you ever held on any kind of emergency call? A. I wasn't.

Q. Were you ever told to stand ready, doing nothing? A. No.

Q. What was your experience as a maintenance man? A. If we didn't have any job, there were always lots of jobs, small jobs in the shop itself. If we didn't have anything to do out in the plant, we usually had a job to do inside.

Q. So you were always busy? [937] A. That is right, almost every time as far as I could know.

Q. There was always a backlog of small jobs to do? A. That is right.

Q. There never was any reason for any man being idle? A. No.

[943] BENJAMIN F. POLITZER (Respondent's witness).

Direct Examination:

[948] Q. During the latter part of 1943, Mr. Politzer, do you recall some activities in connection with union organization among the maintenance men? A. Yes. Men were trying to organize and there was the biggest topic of conversation around the plant in the spare moments we had. Inside the plant and outside, this was going on. I spoke to Joe—

Q. Joe who? A. Joe Zicarelli. And Chairman and Harry Goldson. The men, they had quite a lot of talks with them.

Q. During what period was this? A. All the while that they were trying to form, become unionized, get union representation, until they did.

Q. Can you place—try and place the time. Was that going on in November of 1943? A. Yes, sir.

Q. And before that? A. Yes, sir.

Q. About how long before that, approximately? A. I would say a couple of months, at least.

Q. You say you talked with the men? A. Yes, sir.

[949] Q. And did the men talk with you? A. Yes, sir.

Q. And you said, did you, it was the constant subject of conversation? What did you say? A. Well, I said it was the chief topic of conversation.

Q. Inside and outside the plant, you said? A. That is right.

Q. Who were some of the men who talked with you? A. Joe Zicarelli, Chairman—

Q. Did Joe talk with you often? A. Yes, sir, he called me outside the plant when I was going to lunch and before he would come to work. Every time I would see him, if he came to work ahead of time, or he would come into my office and we would talk. He let me know what was happening.

Q. Did Mr. Chairman talk to you? A. Yes, sir.

Q. Did you talk to Mr. Chairman? A. Yes, sir.

Q. About these union activities? A. Yes, sir.

Q. Did they talk to you freely about them? A. Yes, sir.

Q. Did you talk to them freely about them? A. Yes, sir.

[950] Q. Did you ever report to any company official about these happenings that were going on? A. No, sir.

Q. Did any official ever ask you about any of them? A. No, sir.

Q. What were some of the things that Mr. Zicarelli said to you, for example?

Mr. Macht: I object to that unless it is narrowed down. I don't want to go all over the lot.

Mr. Levy: I will narrow it.

Q. You say you talked to the men and the men talked to you freely. Did they confide in you? Did they tell you their plans so far as you know? A. Yes, sir.

Q. Do you feel that they confided in you fully? A. Yes, sir.

Q. And did you give them your full confidence? A. Yes, sir.

Q. And your sympathy? A. Yes, sir.

[951] Q. Did Mr. Zicarelli ever say anything against the company [952] to you? A. Yes, sir. He told me that the company wasn't playing fair with the men. He said that they had bought out the CIO, that the management was leeches and blood-suckers.

A. That the management had lied to them that they weren't paying them what they deserved. He told me that all maintenance men should get the same rate of pay and a lot of other things like that.

[952] Q. Didn't you feel that as a supervisor, supervisory employee, you should say something in defense of the company?

[953] A. I didn't feel I ought to protect the company. I didn't feel I was part of the company. The company didn't treat [954] me that way in all their discussions with the men about the unionization. I wasn't consulted. I felt with the men. I wasn't too happy with my salary or the way the company had treated me.

. . .

[960] Q. (By Mr. Levy) During this interval before November, 1943, or around November, 1943, before the end of the year, did Mr. Chairman ever talk to you about union organization? A. Yes, sir.

Q. Tell us some of the things he said to you. A. That the company wasn't treating the men right, or playing fair with them. They were more interested in their own pocket-books than in the men. The men had a right to organize and be protected.

Q. Go ahead. Can you remember any exact language he may have used in talking to you? [961] A. No, sir.

Q. What did you say to Mr. Chairman? A. Pardon me?

Q. What did you say to Mr. Chairman when he made those remarks to you? A. I agreed with him.

Q. What did you say? A. The company wasn't treating the men right, weren't treating me right. They seemed to be more interested in their own selves than the men.

. . .

[963] Q. Were you expressing your own views?

. . .

A. Yes, sir.

Q. Your own views entirely?

. . .

A. Yes, sir.

. . .

[964] Q. Did anybody in the company ever tell you that the company didn't want a union? A. No, sir.

. . .

[966] Q. Did anybody in the company tell you to tell Mr. Chairman—did anybody in the company, prior to the 30th when Mr. Chairman came down to testify, say anything to you that would have led you to think that Mr. Chairman would be in bad graces if he came down to testify? A. No, sir.

[970] Q. Mr. Politzer, did Mr. Kende at that time say to you that he was out to get Mr. Chairman because he testified at the proceeding? A. No, sir.

Q. Did Mr. Weintraub say that? A. No, sir.

Q. Did either of them say anything like that? A. No, sir.

Q. Are you positive? A. Yes, sir.

Q. As you now look back upon that incident, with the passage of the months, Mr. Politzer, is there anything that happened at that conference, anything whatsoever, that might have led you to think that Mr. Kende or Mr. Weintraub wanted to get Mr. Chairman because he testified in that proceeding? A. No, sir.

Q. After you left Mr. Kende's office, what did you do? A. I went back to my office and Harry Goldson was there. I told Harry.

Q. Harry Goldson, the man who testified for the Board in this proceeding here? A. Yes, sir.

[971] I told Harry that I had just come from Mr. Kende's office, and that Kende and Weintraub had been going over Imre's personnel file and Kende was very angry with him, the way he had acted on the staircase, and Kende thought that he was a Communist.

I asked Harry what he thought about it because Harry was much more familiar with the Communist Party and their doctrines and what-not than I was and Harry told me he didn't believe Imre was a Communist.

I then told Harry "you had better tip Imre off about the conference in Mr. Kende's office."

Q. Did you tell Harry Goldson that Mr. Kende was

looking for something criminal to get on Mr. Chairman?
A. No, sir.

Q. Did you tell Harry Goldson that anyone in the company was out to get Chairman because he testified in the representation proceeding? A. No, sir.

Q. At that time, Mr. Politzer, does it continue to be the fact, as you previously testified, that your sympathies were with the men?

. . .

A. Yes, sir.

. . .

[972] Q. Did you hear Harry Goldson testify that you made that remark to him as a kind of a friendly warning?

A. Yes, sir.

Q. Did you make it as a kind of friendly warning? A. Yes, sir.

. . .

Q. What did you mean when you told Harry Goldson that he should "tip off Chairman"?

. . .

A. That Mr. Kende thought he was a Communist. Mr. Kende was very angry with him for the way he acted on the staircase, that he defied his authority.

. . .

[974] Q. As you look back upon it now, Mr. Politzer, do you think that Mr. Kende or Mr. Weintraub or the company were at that time out to get Mr. Chairman because he testified?

. . .

[975] A. No, sir.

Q. Who would you say was the most active union organizer? A. Joe Zicarelli.

Q. Was anything ever said by anyone in the company about getting Zicarelli? A. No, sir.

Q. Because he was an active union organizer? A. No, sir.

Q. Or because he testified in a representation proceeding? A. No, sir.

Q. Or any of the other men who testified in that proceeding? A. No, sir.

. . .

[979] Q. Until the incident of December 30, 1943, did you ever talk another time to Mr. Kende or Mr. Weintraub about Mr. Chairman? A. No, sir.

Q. Did you talk to him about Mr. Chairman before the incident of December 30, 1943? Did you talk to Mr. Weintraub or Mr. Kende again about Mr. Chairman before that incident occurred with Mr. Weintraub on the night of December 30, 1943? A. No, sir.

Q. Did they talk to you? A. No, sir.

Q. About Mr. Chairman? A. No, sir.

Q. Did anybody in the company talk to you about Mr. Chairman? A. No, sir.

[980] Q. Are you sure about that? A. Very sure.

Q. During that time, between November 30, 1943, the day of the hearing, and the day before your conversation with Mr. Kende, between that time and the time that you were told about the incident with Mr. Weintraub that night, did you think the company was out to get Chairman because he testified at the representation proceeding?

. . .

A. No, sir.

. . .

[982] Q. Did Sam Pearl say he hadn't seen anything of the incident? A. He told me he hadn't seen enough of it or heard enough of it to—at least, that is what I gathered from him.

I asked him whether Weintraub was drunk and they said no. He looked very tired but he wasn't drunk.

. . .

[984] Q. Tell us about the conversation. What did he say and what did you say? A. I talked to Imre and I told him I checked with people [985] around the plant, the

Production Department, and that they didn't verify his story that Weintraub was drunk and, I don't remember the exact words, but that was the gist of the conversation. I sort of let things drop then and went about our work.

. . .

[999] Q. We speak of mad as emotional about a situation. Do you mean mad in that sense, Mr. Politzer?

. . .

A. Yes, sir.

Q. Then I understand you to be saying that you were in an [1000] emotional state when you left Kende's office?

. . .

A. Yes, I felt that they were my men. It was the first time I have ever had any number of men under me, and I resented anybody telling me what to do with my men. I was very much put out with it. I didn't realize what—I wasn't even considering Weintraub's point that it would affect his prestige. I was just thinking in a very narrow way as it affected me, personally.

. . .

[1001] Q. I notice that the title on this notice of termination is "Maintenance Engineer"? A. Yes, sir.

Q. Was that position with that title abolished, maintenance engineer? A. We never again hired anybody under that title.

[1002] Q. Was the man that you upgraded an engineer?

A. No, sir. He was a mechanic and he was called a working foreman, and he actually did work with the men.

Q. Did he wear a working uniform? A. Yes, sir.

Q. Had Mr. Chairman worn a working uniform? A. No, sir.

. . .

[1003] Q. Let me ask you this, Mr. Politzer: Did you at that time think that Mr. Weintraub wanted Imre to go because he has testified at that representation proceeding?

A. No, sir.

Q. You are definite about that? A. Very definite about that.

[1004] Q. Do you think Mr. Kende wanted him to go at that time because he had testified at the representation proceeding? A. No, sir.

[1005] Q. Do you think that after Mr. Chairman testified the company was laying for him, out to get him? A. No, sir.

Q. Do you think that when Mr. Chairman was dismissed, that was just a pretext and that the company really wanted to dismiss him because he testified in the representation proceeding? A. No, sir.

[1006] Q. Was there always work to do in the shop among your men? A. Yes, sir.

Q. Was there always a backlog? A. There is always a backlog. We are always way behind. We had to work Sundays to do a lot of work, because we couldn't do it during the week. On our major pieces of equipment, we didn't have any excess and on smaller pieces, such as, one thing in particular, we were always behind on that, and that is gas burners that always got clogged up with wax and had to be cleaned out and had to be reused. There was always a stack of those things around.

Q. Had you ever told Mr. Chairman to put anybody on emergency call and let him stand there waiting for an emergency call? A. No, sir. What we usually did, we tried to teach one man who wasn't doing anything of major importance, to be handy [1007] for any jobs, odd jobs, that might come along. One of these short quick jobs.

Q. But there was always something for the men to do? A. Yes, sir.

[1008] Q. Mr. Politzer, Mr. Chairman has testified, on page 138 of the official transcript, that after your talk with

Mr. Kende, you said to Mr. Chairman, "Imre, Kende wants you to apologize and you better do it or else they are after your scalp."

Do you remember making any such remarks to Mr. Chairman? A. I remember speaking to Imre and telling him that I thought he ought to apologize.

Q. Did you tell him Kende wanted him to apologize? A. No, sir.

. . .

[1009] Q. Mr. Chairman has testified on page 144 of the official transcript, and I quote from his testimony, "then Politzer talked to me that I should apologize to Kende and then, next day, Mr. Politzer again told me that on account of my going down to give testimony they are after my scalp."

Did you ever tell that to Mr. Chairman? A. No, sir. I told him I thought he ought to apologize.

. . .

[1014] Q. Do you recall whether you had said anything like that? Do you recall now whether you said that the company was out to get him because he testified? Do you definitely recall such a thing? A. No, sir.

Q. But you say it is possible you might have said such a thing? A. I might have.

Q. If you had said anything like that, Mr. Politzer, would it be on the basis of anything that Mr. Weintraub or Mr. Kende told you? A. No, sir. It was just on the way I had been feeling at the time. All the build-up that I had that the company would go to any lengths to stop unionization.

Q. What "build-up" did you have? A. All the talks with the men, Joe, Imre, Harry.

Q. They led you to think that? Those talks led you to think that? A. Yes, and it didn't take much encouragement. I was resentful of the way the company had been treating me.

Q. Mr. Politzer, you say you might have, although you don't recall having said it; would you have had any basis

1

or justification for saying anything like that? A. There was nothing in the conversation that I had with Kende or Weintraub. I never talked to anybody else in the [1015] same authority or anywhere near their authority, nothing ever gave me that impression.

Q. Did you ever talk to any other officials of the company who would give you a basis for justification for saying that? A. No, sir. If they had been out to get anybody, they could have gotten Joe.

[1019] *Cross examination:*

[1021] Q. And if they didn't do their jobs properly, were you the man to either discipline them, or fire them?

A. Well, about disciplining, I don't know. There never has been occasion to—if I thought the men were out of [1022] order, I would tell them so, and they would take my word. As far as firing, it was in the nature of a recommendation to the personnel manager to fire them. He would back up my authority.

[1066] Q. When you left Mr. Kende's office, were you of the impression that Mr. Chairman was in for a raise in pay? A. No, sir.

Q. Were you of the impression that Mr. Chairman was in for a discharge? A. No, sir. All I knew is that he, Kende, was very mad at him for having defied him. Mr. Kende didn't think highly of his acts.

[1072] Q. Did you feel at that time that Kende was out to get Chairman's scalp? A. I felt that Kende was mad as blazes at him for having defied him.

[1112] Q. Had you given any special instructions to Mr. Chairman to watch out for any tampering or anything that

may happen because of the approaching holidays? A. The only instructions I gave him were not to let anybody be caught with a bottle.

[1120] Q. Mr. Politzer, when you were telling Mr. Weintraub about Mr. Chairman's resignation, what was it that you said to Mr. Weintraub? [1121] A. I told Mr. Weintraub that Imre had offered me—had promised me his resignation, and Imre had offered it, and he was going to submit it in a couple of days, and it would be effective in about ten days.

[1157] ERNEST WERNEBERG (Respondent's Witness).

Direct examination:

Q. Mr. Werneberg, were you employed at the Universal Camera Corporation in 1943? A. I was.

Q. And 1944? A. I was.

Q. In late 1943 in what capacity were you employed?
A. Maintenance mechanic.

Q. On what shift? A. On the 12 to 8 shift.

[1160] Q. Were you the shop steward after Mr. Zicarelli?
A. Right after Mr. Zicarelli left.

Q. About how long were you a shop steward?

A. Oh, I guess from some time in August, June of 1944 to 1945, around July—I think around July of 1945.

Q. And during the period that you were shop steward, was it your job to discuss grievances with the company?

[1161] A. Yes, sir.

Q. Did you take up any grievances with the company?

A. Yes, sir. I took up a couple of grievances.

Q. With whom for the company? A. With Mr. Weintraub.

Q. Did Mr. Weintraub always receive you when you had a grievance? A. Always received us.

Q. (By Mr. Levy) How did he handle the grievances? A. He always handled it to the best of our satisfaction. All the grievances turned out satisfactorily.

[1287] IRVING WEINTRAUB (Respondent's witness recalled in rebuttal).

[1288] *Direct examination:*

Q. (By Mr. Levy) Mr. Weintraub, from time to time I have told you that we have been asked to produce certain papers and we have been doing so. I wanted you to produce them is what I have told you, is it not? A. That is right.

Q. I show you a copy of the subpoena duces tecum and ask you to look at that list on the front and back of the subpoena. That is what I told you to look for, is that right? A. That is right.

[1290] Trial Examiner Feiler: What is your position on that, Mr. Macht, or do you take any position?

The Witness: It is the Commonwealth Warehouse and you can call them. I believe it is on 34th Street.

Cross examination:

[1291] Trial Examiner Feiler: You say you do have the time cards somewhere in the warehouse?

[1292] The Witness: That is right.

Trial Examiner Feiler: You do have them for 1943?

The Witness: Oh, yes. We don't destroy them.

Trial Examiner Feiler: Do I take it that you have no objection and you are willing to continue the search, if that is directed?

The Witness: Oh, definitely. I will order all those crates into the plant.

Trial Examiner Feiler: I know you would, but you have no objection to continuing that search if it is directed?

The Witness: Definitely. I will go right on it tomorrow.

Trial Examiner Feiler: You might want to consider that for a while, Mr. Macht. If you want to discuss it with any other people in your office, and let me know your position on it, that would be all right.

The Witness: That is why I am willing to give you the name of the warehouse and all that.

Trial Examiner Feiler: Do you want to take a minute or two to do that, or do you want to rest on the record as it is?

Mr. Macht: I will let you know tomorrow.

Trial Examiner Feiler: What I have in mind is that the question of papers has continued over quite a few [1293] days, and other than the further search for any papers, I would guess that tomorrow would be our closing day, and I don't want to have to consider that question anew some time in the future.

Mr. Macht: I should rather have a further search tonight, if they can make them.

Trial Examiner Feiler: The witness has said he can't make further search unless he has those boxes removed to his plant, and he further says he is willing to do that.

Mr. Macht: Can he do that tonight?

The Witness: Oh, no. We have to make arrangements for trucks.

Trial Examiner Feiler: I should like to know your position on it so that if it raises any problem in my mind I can think it over myself and make a decision on that, too. So if you want to discuss it further, I would rather you took a few minutes right now and straightened that part out.

Mr. Macht: Will it make any difference what my position was if I gave it to you tomorrow or tonight? I don't think it would make any difference, Mr. Examiner.

Trial Examiner Feiler: I don't think it would. If you want to think it over over night, I don't suppose I would object to that.

. . .

[1302] Trial Examiner Feiler: As I understand it, there is more or less an impasse in that the witness has testified that he has done all that he can do with the records at this time.

If there is anything more to be done, he has testified it is a matter of days, and I am letting counsel for the Board consider that over night and give me his position.

Mr. Levy: What will the alternatives be?

Trial Examiner Feiler: I see two possible alternatives, but we can discuss that further tomorrow morning.

Mr. Levy: Is there anything advantageous to discuss while Mr. Weintraub is here?

Trial Examiner Feiler: No, I don't think there is. There is one thing we can settle, Mr. Macht, and that is you have no further records in mind now that you want other than what is listed in the subpoena, is that right?

Mr. Macht: Mr. Examiner, I have had time to think it over and I wouldn't even request until tomorrow. I can give you my position now. Rather than postpone this hearing any longer, I do not feel that we should do anything that would postpone this further. I think it is the type [1303] of case that we have taken sufficient testimony here. That is my position.

Trial Examiner Feiler: Then there are no further records at this time that you call upon the company to produce, is that right?

Mr. Levy: The company has complied with the subpoena duces tecum to the extent that the Examiner required.

Trial Examiner Feiler: The witness has testified—

Mr. Levy: We are excused from further performance.

Trial Examiner Feiler: The witness has testified as to what he has done and there will be nothing further then, in view of his testimony.

Mr. Levy: Thank you, sir.

• • •

Board's Exhibit I**UNITED STATES OF AMERICA****BEFORE THE****NATIONAL LABOR RELATIONS BOARD**

In the Matter of**Universal Camera Corporation
and****Local Union No. 3, International Brotherhood of
Electrical Workers**

Case No. 2C5410**Date filed 1/28, 1944****CHARGE**

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that Universal Camera Corporation, 32 West 23 Street, N. Y. C. has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and (4) of said Act, in that

On January 25, 1944, it, by its officers, agents and employees, terminated the employment of Imre Chairman because he gave testimony under the Act in the matter of Universal Camera Corporation and Local Union No. 3, International Brotherhood of Electrical Workers, Case No. 2-R-4242, and because of his activity in behalf of Local Union No. 3, International Brotherhood of Electrical Workers, a labor or-

ganization, and at all times since said date it has refused and does now refuse to employ the above named employee.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the name and official position of the person acting for the organization.)

JOHN K. LAPHAM

John K. Lapham, Business Representative
Local Union No. 3, I. B. E. W.
130 East 25 Street, N. Y. C.

Subscribed and sworn to before me this
27 day of January, 1944 At 130 East 25 St.
New York City

FRANK J. BERRY

NOTARY PUBLIC, QUEENS COUNTY

Queens Co Clk's No. 3996; Reg. No. 392-B-

CERTIFICATE FILED IN

New York Co Clk's No. 1523, Reg. No. 941-B-5

Commission Expires March 30, 1945

(Notarial Seal)

Respondent's Exhibit 2C
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Y

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS OF
GREATER NEW YORK AND VICINITY**

LOCAL UNION No. 3

Affiliated with American Federation of Labor

130 East 25th Street, New York 10, N. Y.

January 25, 1945

**KAYE, SCHOLER, FIERMAN & HAYS
149 Broadway
New York, N. Y.**

Attention: Mr. Harold L. Fierman

Gentlemen:

Please be advised we have withdrawn the unfair labor charge filed before the National Labor Relations Board in the matter of Imre Chairman, as of today's date.

Very truly yours,

**JOHN K. LAPHAM /s/
John K. Lapham
Business Representative**

jkl;jc
afoe
23076

Respondent's Exhibit 1C
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P
Y**NATIONAL LABOR RELATIONS BOARD****SECOND REGION****120 WALL STREET
NEW YORK 5, N. Y.****February 10, 1945****UNIVERSAL CAMERA CORPORATION
32 West 23rd Street
New York, N. Y.****Re: Case No. 2-C-5410****Gentlemen:**

This is to advise you that the charge in the above matter has, with my approval, been withdrawn without prejudice.

Very truly yours,**CHARLES T. DOUDS /s/
Charles T. Douds
Regional Director**

(8669)

[fol. 1] UNITED STATES COURT OF APPEALS FOR THE SECOND
Circuit—October Term, 1949

No. 54

(Argued December 6, 1949. Decided January 10, 1950)

Docket No. 21395

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

UNIVERSAL CAMERA CORPORATION, Respondent

Before: L. Hand, Swan and Frank, Circuit Judges

On petition of the National Labor Relations Board for an order, "enforcing" an order of the Board to "cease and desist from discharging . . . any employee because he has filed charges or given testimony under the Act"; to "offer one, Imre Chairman, immediate and full reinstatement to his former, or a substantially equivalent, position"; to make him "whole for any loss of pay he has suffered because of the Respondent's discrimination against him"; and to post an appropriate notice.

[fol. 2] A. Norman Somers for the petitioner.

Frederick R. Livingston for the respondent.

L. Hand, Circuit Judge:

This case arises upon a petition to enforce an order of the Labor Board, whose only direction that we need consider was to reinstate with back pay a "supervisory employee," named Chairman, whom the respondent discharged on January 24, 1944, avowedly for insubordination. If the Board was right, the discharge was in fact for giving testimony hostile to the respondent at a hearing conducted by the Board to determine who should be the representative of the respondent's "maintenance employees." Chairman was an assistant engineer, whose duties were to supervise the "maintenance employees," and he testified at the hearing in favor of their being recognized as a separate bargaining unit. The respondent opposed the recognition of such a unit, and several of its officers testified to that effect, among whom were Shapiro, the vice-president, Kende, the

chief engineer, and Politzer, the "plant engineer." The examiner, who heard the witnesses, was not satisfied that the respondent's motive in discharging Chairman was reprisal for his testimony; but on review of the record a majority of the Board found the opposite, and on August 31, 1948, ordered Chairman's reinstatement. The respondent argues (1) that the majority's findings are subject to a more searching review under the New Act than under the Old; (2) that in the case at bar the findings cannot be supported, because they are not supported by "substantial evidence"; and (3) that its liability to Chairman, if any, ended with the passage of the New Act.

The substance of the evidence was as follows. On November 30, 1943, Chairman and Kende testified at the [fol. 3] hearing upon representation, after which Kende told Chairman that he had "perjured" himself; and on the stand in the proceeding at bar Kende testified that Chairman "was either ignorant of the true facts regarding the organization within the company . . . or . . . he was deliberately lying, not in one instance, but in many instances, all afternoon"; and "that there was definite doubt regarding his suitability for a supervisory position of that nature." The examiner believed the testimony of Chairman that two other employees, Goldson and Politzer, had cautioned him that the respondent would take it against him, if he testified for the "maintenance-employees"; and Kende swore that he told another employee, Weintraub—the personnel manager—that he thought that Chairman was a Communist. After Politzer reported to him on December second or third that this was a mistake, Kende told him to keep an eye on Chairman. From all this it is apparent that at the beginning of December Kende was hostile to Chairman; but he took no steps at that time to discharge him.

Nothing material happened until the very end of that month, when Chairman and Weintraub got into a quarrel, about disciplining a workman, named Kollisch. Chairman swore that Weintraub demanded that he discharge Kollisch for loafing; and Weintraub swore that he only demanded that Chairman put Kollisch to work. In any event high words followed; Chairman told Weintraub that he was drunk; Weintraub brought up a plant guard to put Chairman out of the premises, and the quarrel remained hot, until one, Zicarelli, a union steward, succeeded in getting

the two men to patch up an apparent truce. Two days later Weintraub saw Politzer and told him that he had heard that Politzer was looking into Chairman's statement that Weintraub was drunk, and on this account Weintraub asked Politzer to discharge Chairman. Politzer testified that he answered that Chairman was going to resign soon [fol. 4] anyway, and this the examiner believed. He did not, however, believe Politzer's further testimony that Chairman had in fact told Politzer that he was going to resign; he thought that Politzer either was mistaken in so supposing, or that he had made up the story in order to quiet Weintraub. Probably his reason for not believing this part of Politzer's testimony was that he accepted Chairman's testimony that ten days later Politzer intimated to Chairman that it would be well for him to resign, and Chairman refused. Whatever the reason, Weintraub did not, after his talk with Politzer, press the matter until January 24, 1944, when, learning that Chairman was still in the factory, he went again to Politzer and asked why this was. When Politzer told him that Chairman had changed his mind, Weintraub insisted that he must resign anyway, and, upon Politzer's refusal to discharge him, they together went to Kende. Weintraub repeated his insistence that Chairman must go, giving as the reason that his accusation of drunkenness had undermined Weintraub's authority. Kende took Weintraub's view and Politzer wrote out an order of dismissal. No one testified that at this interview, or any time after December first, any of the three mentioned Chairman's testimony at the representation hearing.

As we have said, the examiner was not satisfied that the Board had proved that Chairman's testimony at the representation proceeding had been an actuating cause of his discharge; but, not only did the majority of the Board reverse his ruling as to that, but they also overruled his finding that Politzer had told Weintraub on January first that Chairman was going to resign. They then found that Kende and Weintraub had agreed to bring about Chairman's discharge, at some undefined time after December first, because of Chairman's testimony; and that Weintraub's complaint on January 24 was a cover for affecting that purpose. Whether these findings were justified is the [fol. 5] first, and indeed the only important, question of fact; and as a preliminary point arises the extent of our review.

This has been the subject of so much uncertainty that we shall not try to clarify it; but we must decide what change, if any, the amendment of 1947* has made. Section 10 (e) now reads that the findings "shall be conclusive" "if supported by substantial evidence on the record considered as a whole"; and the original was merely that they should be conclusive, "if supported by evidence." In *National Labor Relations Board v. Pittsburgh Steamship Company*** the Supreme Court refused to say whether this had made any change, and remanded the case to the court of appeals to decide the point in the first instance. Of the four decision- which have discussed it, two have held that no change, or no material change, was made; † one has held that the amendment was intended "to give the courts more latitude in review," but did not decide how much; †† and the fourth merely held that it did not make the review a "hearing de novo." ††† (Since the opinion in the last was written by the same judge who wrote the first, it is to be read as deciding that there was no change.) It is true that there were efforts, especially in the House, to give to courts of appeal a wider review than before; but the Senate opposed these, and, so far as concerns the adjective, "substantial," it added nothing to the interpretation which the Supreme Court had already put upon the earlier language. †††† The most probable intent in adding the phrase, [fol. 6] "on the record considered as a whole," was to overrule what Congress apparently supposed—perhaps rightly—had been the understanding of some courts: i.e. that, if any passage could be found in the testimony to support a finding, the review was to stop, no matter how much other parts of the testimony contradicted, or outweighed, it. That the words throughout section ten were chosen with deliberation and care is evident from the changes in § 10

(b), apparently intended to confine the Board to the record
* §160 (e), Title 29, U. S. C.

** 337 U. S. 656.

† *N. L. R. B. v. Austin Co.*, 165 Fed. (2) 592 (C. A. 7).

†† *N. L. R. B. v. Caroline Mills*, 167 Fed. (2) 212 (C. A. 5).

††† *Victor M'f'g & Casket Co.*, 174 Fed. (2) 867 (C. A. 7).

†††† *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 222; *N. L. R. B. v. Columbian Enameling & Smelting Co.*, 306 U. S. 292, 300.

before it, and in § 10 (c), restricting it in the admission of evidence to Rule 43 (a) of the Rules of Civil Practice. It appears to us that, had it been intended to set up a new measure of review by the courts, the matter would not have been left so at large. We cannot agree that our review has been "broadened"; we hold that no more was done than to make definite what was already implied.

Just what that review was is another and much more difficult matter—particularly, when it comes to deciding how to treat a reversal by the Board of a finding of one of its own examiners. Obviously no printed record preserves all the evidence, on which any judicial officer bases his findings; and it is principally on that account that upon an appeal from the judgment of a district court, a court of appeals will hesitate to reverse. Its position must be: "No matter what you saw of the witnesses and what else you heard then these written words, we are satisfied from them alone that you were clearly wrong. Nothing which could have happened that is not recorded, could have justified your conclusion in the fact of what is before us." That gives such findings great immunity, which the Rules¹ extend even to the findings of masters, when reviewed by a district judge. The standing of an examiner's findings under the Labor Relations Act is not plain; but it appears [fol. 7] to us at least clear that they were not intended to be as unassailable as a master's. The Old Act provided for "examiners"; * but they did not have to make reports, and although § 10 (c) of the New Act requires them to do that,** it does not undertake to say how persuasive their findings are to be. On the other hand, § 8 (a) of the Administrative Procedure Act † provides that "on appeal from review of the decision" of an "officer" who has presided at a hearing, "the agency . . . shall have all the powers which it would have in making the initial decision." It is clear that these words apply to the decisions of the "agency" upon the evidence; but nothing is said as to what effect the "agency" must give to the "officer's" findings; except that, if the text be read literally, it could be argued that the "agency" was

¹ Rule 53 (e) (2).

* § 154, Title 29, U. S. C.

** § 60 (c), Title 29, U. S. C.

† 1007 (a), Title 5, U. S. C.

to disregard it. The reports in Congress do not help very much. The Senate Report¹ merely said that the findings "would be of consequence, for example, to the extent that material facts in any case depend on the determination of the credibility of witnesses as shown by their demeanor or conduct at the hearing." The House Report² was the same, *in ipsissimis verbis*, although it did add that "in a broad sense the agencies reviewing powers are to be compared with that of courts under § 10 (a) of the bill." That would have made them as conclusive upon an "agency" as the "agency's" findings are upon a court; and it is safe to say that the words will not bear so much. When the same question came up under the Old Act, the courts left the answer equally uncertain. The Seventh Circuit in *A. E. Staley Manufacturing Company v. National Labor Relations Board*³ said that, "where it" (the Board) "reaches a conclusion opposite to that of an Examiner, we think the report of the latter has a bearing on the question of substantial support and materially detracts therefrom"; and that has in substance received the approval of the Eighth Circuit,⁴ and of the Sixth,⁵ as well as a recent reaffirmation by the Seventh itself.⁶ All this leaves the question in confusion. On the one hand we are not to assume that the Board must accept the finding, unless what is preserved in the record makes it "clearly erroneous." That would assimilate examiners to masters, and, if that had been intended, we should expect a plainer statement. On the other hand, the decisions we have cited certainly do mean that, when the Board reverses a finding, it shall count in the court's review of the Board's substituted finding; the case does not then come up as it does, when the testimony has been taken by deposition.⁷ On the whole we find ourselves unable to apply so palpable a standard without

¹ Senate Report 752 (1945).

² House Report 1980 (1946).

³ 117 Fed. (2) 868, 878.

⁴ *Wilson & Co. v. N. L. R. B.*, 123 Fed. (2) 411, 418.

⁵ *N. L. R. B. v. Ohio Calcium Co.*, 133 Fed. (2) 721, 724.

⁶ *Wyman Gordon Co. v. N. L. R. B.*, 153 Fed. (2) 480, 482.

⁷ *N. L. R. B. v. Sartorius*, 140 Fed. (2) 204 (C. A. 2).

bringing greater perplexity into a subject already too perplexing. The weight to be given to another person's conclusion from evidence that has disappeared, depends altogether upon one's confidence in his judicial powers. The decision of a child of ten would count for nothing; that of an experienced master would count for much. Unless we are to set up some canon, universally applicable, like that of Rule 53 (e) (2), each case in this statute will depend upon what competence the Board ascribes to the examiner in question. Section 4 (a) provides that he shall be an [fol. 9] employee of the Board,* which will therefore have means of informing itself about his work. We hold that, although the Board would be wrong in totally disregarding his findings, it is practically impossible for a court, upon review of those findings which the Board itself substitutes, to consider the Board's reversal as a factor in the court's own decision. This we say, because we cannot find any middle ground between doing that and treating such a reversal as error, whenever it would be such, if done by a judge to a master in equity.

The foregoing discussion is relevant in the case at bar for the following reason. One ground why the evidence failed to convince the examiner of any agreement between Kende and Weintraub to discharge Chairman, was that he thought it quite as likely that the quarrel between Weintraub and Chairman at the end of December still rankled in Weintraub's mind, and induced him to insist upon Chairman's discharge on January 24, 1944. It became important in this view to explain why Weintraub waited for over three weeks; and this the examiner did explain because he believed that Politzer had told Weintraub that Chairman was going to resign. When the majority of the Board refused to accept this finding, they concluded that, since this left Weintraub's delay unexplained, his motive was to be related back to the quarrel of Kende and Chairman on November 30. We should feel obliged in our turn to reverse the reversal of this finding, if we were dealing with the finding of a judge who had reversed the finding of a master; because the reasons given do not seem to us enough to overbear the evidence which the record did not preserve, and which may have convinced the examiner. These were (1) that the examiner did not believe all that Politzer had said; and (2)

* § 154, Title 29, U. S. C.

[fol. 10] that the finding was "irreconcilable with the other related facts and all the other evidence bearing on Politzer's behavior and attitude." It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all. Nor can we find "other related facts" which were "irreconcilable" with believing that Politzer told Weintraub that Chairman was going to resign. Indeed, Chairman himself swore than on January 11, Politzer suggested to him that he resign, which affirmatively serves to confirm the examiner's finding that Politzer told Weintraub that Chairman would resign in order to placate him. However, as we have said, we think that we are altogether to disregard this as a factor in our review, which we should confine to the bare record; and on that we cannot say that Politzer's testimony had to be believed, in the face of Chairman's denial that he ever told him that he would resign.

There remains the question whether, with this explanation of Weintraub's delay missing, there was "substantial evidence" that the cause of Chairman's discharge was his testimony; and on that the Board had the affirmative; so that it is not enough that Kende and Weintraub might have agreed to find a means of getting rid of Chairman, or that Kende unassisted might have been awaiting an opportunity. Once more, if this was the finding of a judge, we should be in doubt whether it was sufficiently supported. When Weintraub went to Politzer on January 24, 1944, with his complaint at Chairman's continued presence in the factory, and when the two went to Kende because Politzer would not discharge Chairman, if Weintraub was acting in accordance with an agreement between Kende and himself, he was concealing the facts from Politzer. So too was Kende at the ensuing interview; indeed, we must [fol. 11] assume that the two had arranged beforehand to keep Politzer in the dark, else Weintraub could scarcely have relied upon Kende to play his part. This appears to us to be constructed substantially out of whole cloth, so improbable is it that they should have gone to such devious means to deceive Politzer. On the other hand, although it is possible that Kende had been waiting for a proper occasion, independently of Weintraub, and that he seized upon Weintraub's complaint, being secretly actuated by

his old grievance, we do not read the majority's decision as distinctly indicating that they meant so to find. But, if they did, unless we assume that Weintraub's complaint was trumped up *ad hoc*, to deceive Politzer, it becomes the merest guess that Kende did not find it alone a sufficient reason for his action, and reverted to his concealed spite.

Nevertheless, in spite of all this we shall direct the Board's order to be enforced. If by special verdict a jury had made either the express finding of the majority that there was an agreement between Kende and Weintraub, or the alternate finding, if there be one, that Kende without Weintraub's concurrence used Weintraub's complaint as an excuse, we should not reverse the verdict; and we understand our function in cases of this kind to be the same. Such a verdict would be within the bounds of rational entertainment. When all is said, Kende had been greatly outraged at Chairman's testimony; he then did propose to get him out of the factory; he still thought at the hearings that he was unfit to remain; and he had told Weintraub to keep watch on him. We cannot say that, with all these circumstances before him, no reasonable person could have concluded that Chairman's testimony was one of the causes of his discharge, little as it would have convinced us, were we free to pass upon the evidence in the first instance.

[fol. 12] The question of law involved does not appear to us difficult. When Chairman was discharged, he was within the protection of the statute. It is true that he ceased to be so protected when the Old Act was repealed in 1947; but the repeal did not extinguish the respondent's "liability," if there was any;* so that the only question is what was the measure of that "liability." By that word, we understand the duty which the statute imposed upon the respondent to make restitution for the wrong—the discharge. That comprised the restoration of Chairman to his position as "supervisory engineer," and the payment of any loss he may have suffered meanwhile. To preserve the "liability" is to preserve this duty; and it would be irrelevant, if similar conduct—a discharge for testifying in a proceeding before the Board—would not now be a wrong at all, a question we assume, but do not decide. It is true that Chairman's restoration will give him no immunity from discharge for any reason, or for no reason, except

* 109. Title 5, U. S. C.

one—that he gave the testimony on November 30, 1943, for which he was discharged on January 24, 1944. Of course by the Board's order he gains no status of which the New Act would have stripped him, and he remained in the respondent's employ. But, since we cannot say that he would not have still been in that employ, save for the wrong, it is part of his remedy that he should have the chance to qualify once more. It is no doubt unfortunate that upon restoration, any later discharge for subsequent cause will be apt to be interpreted as a covert reassertion of the old wrong; but that cannot be helped; it is a consequence of making motive the test of legal wrong.

An enforcement order will issue.

[fol. 13] SWAN, *Circuit Judge*, dissenting:

In *National Labor Relations Board v. A. Satorius & Co.*, 140 F. 2d 203, 205 we said that "if an administrative agency ignores all the evidence given by one side in a controversy and with studied design gives credence to the testimony of the other side, the findings would be arbitrary and not in accord with the legal requirement." I think that is what the majority of the board has done in the case at bar. I would reverse its finding of motive and deny enforcement of the order.

[fol. 14] IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 21395

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

UNIVERSAL CAMERA CORPORATION, Respondent

Notice of Submission of Decree

To: Frederick R. Livingston, Esquire, Messrs. Kaye, Scholer, Fierman & Hays, 149 Broadway, New York 6, New York.

Please take notice that on January 25, 1950, the proposed decree, a copy of which is annexed hereto and made a part hereof, drafted pursuant to this Court's opinion of Janu-

ary 10, 1950, will be transmitted to the Judges of the United States Court of Appeals for the Second Circuit by the Clerk for signature.

(s.) A. Norman Somers, Assistant General Counsel,
National Labor Relations Board.

Dated: _____

[fol. 15] IN THE UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

No. 21395

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

UNIVERSAL CAMERA CORPORATION, Respondent

DECREE ENFORCING AN ORDER OF THE NATIONAL LABOR
RELATIONS BOARD

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its decision and order dated August 31, 1948. The Court, on December 6, 1949, heard arguments of respective counsel, and has considered the briefs and the transcript of record filed herein. On January 10, 1950, the Court, being fully advised in the premises, handed down its decision enforcing the said order of the Board. In conformity therewith, it is hereby

Ordered, Adjudged, and Decreed that the Respondent, Universal Camera Corporation, New York City, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from discharging or otherwise discriminating against any employee because he has filed charges or given testimony under the Act, or in any other manner interfering with the right of employees to file and prosecute charges and to give testimony under the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

- (a) Offer Imre Chairman immediate and full reinstatement to his former or a substantially equivalent position,

without prejudice to his seniority or other rights and privileges;

(b) Make Imre Chairman whole for any loss of pay he has suffered because of the Respondent's discrimination against him, by payment to him of a sum of money equal to [fol. 16] the amount he would normally have earned as wages during the following periods: from January 25, 1944, to the date of the Intermediate Report, and from the date of the Decision and Order to the date of the Respondent's offer of reinstatement, less his net earnings during the same periods;

(c) Post at its plant in New York City, copies of the Notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Second Region, of the National Labor Relations Board, New York, New York, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Second Region of the National Labor Relations Board, New York, New York, in writing, within ten (10) days from the date of this Decree, what steps the Respondent has taken to comply herewith.

(S.) L. Hand, Judge, United States Court of Appeals for the Second Circuit. (S.) Jerome N. Frank, Judge, United States Court of Appeals for the Second Circuit.

Filed: January 25, 1950.

[fol. 17]

"APPENDIX A"

Notice to All Employees

Pursuant to a Decree of the United States Court of Appeals for the Second Circuit enforcing a Decision and Order of the National Labor Relations Board, and in order

to effectuate the policies of the National Labor Relations Act, we hereby notify our members that:

We Will Not Discharge or otherwise discriminate against any employee because he has filed charges or given testimony under the National Labor Relations Act.

We Will Not in any other manner interfere with the right of our employees to file or prosecute charges and to give testimony under the National Labor Relations Act.

We Will Offer to Imre Chairman immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed and make him whole for any loss of pay suffered as a result of the discrimination.

— — —, (Employer); By — — —, (Representative) (Title).

Dated — — —, — — —.

This notice must remain posted 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[fol. 18] [Endorsed:] United States Court of Appeals, Second Circuit. Filed January 25, 1950. Alexander M. Bell, Clerk.

[fol. 19] UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

Re: No. 21395

NATIONAL LABOR RELATIONS BOARD, Petitioner,
against

UNIVERSAL CAMERA CORPORATION, Respondent

SIR:

Please Take Notice, that upon the decision entered herein, the record, the affidavit of John D. Cassidy, sworn

to the 24th day of January, 1950, and all the proceedings had heretofore, a motion will be made by the Respondent, Universal Camera Corporation, at a Motion Term of this Court to be held at the United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, on the 30th day of January, 1950, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order staying execution of the decree of this Court regarding the above-named Respondent on the ground that the Respondent is going to apply to the Supreme Court of the United States for a Writ of Certiorari to review the decision of this Court.

Yours, etc., Kaye, Scholer, Fierman & Hays, Attorneys for Respondent, Office & P. O. Address 149 Broadway, New York 6, N. Y.

Dated: New York, N. Y., January 24, 1950.

To: A. Norman Somers, Esq., Assistant General Counsel, National Labor Relations Board, Federal Security Building, So., Washington 25, D. C.

[fol. 20] UNITED STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,
against

UNIVERSAL CAMERA CORPORATION, Respondent

STATE OF NEW YORK,
County of New York, ss:

John D. Cassidy, being duly sworn, deposes and says:

That he is a Vice-President of Universal Camera Corporation and makes this affidavit in support of the within motion by said Corporation for an order staying the execution of the decree of this Court in the above-entitled matter.

The decision of this Court was rendered on the 10th day of January, 1950, and an application for a decree enforcing the Board's order in accordance with the aforesaid opinion has been noted for submission on the 25th day of January, 1950.

The respondent desires to apply to the Supreme Court of the United States for review of the aforesaid decision believing in good faith that there are questions of law and fact that should be reviewed by the said Supreme Court.

[fol. 21] Within the next thirty (30) days a proper application to the Supreme Court of the United States for a writ of certiorari will be made. Annexed hereto as Exhibit "A" hereof is a professional statement from the respondent's counsel, Kaye, Scholer, Fierman & Hays of 149 Broadway, New York, New York, confirming that there is merit to respondent's case for appeal to the Supreme Court.

In view of respondent's bona fide intent to apply for a writ of certiorari and to promptly prosecute its case if such writ is granted, it is submitted that the within motion for a stay should be granted.

No previous application for the relief sought herein has heretofore been made to any Court or Judge.

John D. Cassidy.

Sworn to before me this 24th day of January, 1950.
Stanley L. Marshall, Notary Public in the State of
New York. Residing in Bronx County. Bronx Co.
Clk's No. 18, Reg. No. 354-M-0. N. Y. Co. Clk's No.
306, Reg. No. 1030-M-0. Commission Expires
March 30, 1950. (Seal.)

[fols. 22-24] Kaye, Scholer, Fierman & Hays, Attorneys,
149 Broadway, New York 6, N. Y.

January 23, 1950.

Re: National Labor Relations Board v. Universal Camera
Corporation, No. 21395

We hereby certify that it is the bona fide intention of the Respondent in the above-entitled matter to make application to the Supreme Court of the United States for a Writ of Certiorari within the next thirty (30) days, and that we believe there is merit in its case, and that the Judgment of the United States Circuit Court of Appeals should be reversed by the Supreme Court of the United States.

Kaye, Scholer, Fierman & Hays, by Frederick R. Livingston, a Member of the Firm.

[fol. 25] IN THE UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

No. 21395

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

UNIVERSAL CAMERA CORPORATION, Respondent

STATEMENT OF THE NATIONAL LABOR RELATIONS BOARD
CONCERNING RESPONDENT'S MOTION FOR STAY OF DECREE

1. The National Labor Relations Board has been served with a copy of the Respondent's motion to stay execution of the decree of this Court on the ground that the Respondent herein is going to apply to the Supreme Court of the United States for a writ of certiorari to review the decision of this Court rendered on January 10, 1950.

2. The National Labor Relations Board has no objection to this Court entering an order staying execution of the said decree of this Court providing that such stay will not exceed a period longer than thirty days after the granting of said motion.

(S.) A. Norman Somers, Assistant General Counsel,
National Labor Relations Board.

Dated: January 26, 1950.

[fol. 26] [Endorsed:] No. 21395. In the United States Court of Appeals for the Second Circuit. National Labor Relations Board, Petitioner, v. Universal Camera Corporation, Respondent. Statement of the National Labor Relations Board Concerning Respondent's Motion for Stay of Decree. A. Norman Somers, Assistant General Counsel, National Labor Relations Board, Federal Security Building, South, Washington 25, D. C.

[fol. 27] UNITED STATES COURT OF APPEALS, SECOND
CIRCUIT

At a Stated Term of the United States Court of Appeals,
in and for the Second Circuit, held at the United States

Courthouse, in the City of New York, on the 30th day of January, one thousand nine hundred and fifty.

Present:

Hon. Learned Hand, Chief Judge; Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

UNIVERSAL CAMERA CORPORATION, Respondent

A motion having been made herein by counsel for respondent to stay execution of the decree of this court,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted on consent on condition that the application for a writ of certiorari be made within thirty days.

Alexander M. Bell, Clerk.

[fol. 28] [Endorsed:] United States Court of Appeals, Second Circuit. National Labor Relations Board v. Universal Camera Corporation. Order. United States Court of Appeals, Second Circuit. Filed Jan. 30, 1950. Alexander M. Bell, Clerk.

[fol. 29] UNITED STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT

Re: No. 21395

NATIONAL LABOR RELATIONS BOARD, Petitioner
against

UNIVERSAL CAMERA CORPORATION, Respondent

SIR:

Please Take Notice, that upon the decision entered herein, the record, the affidavit of Frederick R. Livingston, with exhibit attached thereto, sworn to the 24th day of February, 1950, the order of this Court, entered January 30, 1950, staying execution of the decree, and all the proceedings had heretofore, a motion will be made by the respondent, Universal Camera Corporation, at a Motion Term of

this Court to be held at the United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, on the 27th day of February, 1950, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an extension of the aforesaid Order staying execution of the decree of this Court regarding the above named respondent on the ground that the respondent needs further time to prepare adequately its application to the Supreme Court of the United States [fol. 30] for a writ of certiorari to review the decision of this Court.

Yours, etc., Kaye, Scholer, Fierman & Hays, Attorneys for Respondent, Office & P. O. Address, 149 Broadway, New York 6, N. Y.

Dated: New York, N. Y., February 24, 1950.

To: A. Norman Somers, Esq., Assistant General Counsel, National Labor Relations Board, Federal Security Building, So., Washington 25, D. C.

[fol. 31] UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

Re: No. 21395

NATIONAL LABOR RELATIONS BOARD, Petitioner
against

UNIVERSAL CAMERA CORPORATION, Respondent

STATE OF NEW YORK,
County of New York, ss:

FREDERICK R. LIVINGSTON, being duly sworn, deposes and says:

1. That he is an attorney at law duly admitted to practice before this Court, and a member of the firm of Kaye, Scholer, Fierman & Hays, who represent respondent in this proceeding.

2. That he is fully familiar with the facts and circumstances of this proceeding.

3. That on January 30, 1950, upon respondent's petition, this Court entered an order staying execution of the decree

of this Court, upon condition that respondent apply for a writ of certiorari within thirty (30) days. A photostatic copy of the aforesaid order of this Court is hereby attached to this affidavit and incorporated herein as Exhibit "A."

4. That the time within which, according to the terms of [fol. 32] the aforesaid order, an application for a writ of certiorari must be made is March 1, 1950.

5. That affiant has just been informed that the Court of Appeals for the Sixth Circuit has handed down its opinion in the case of *Pittsburgh Steamship Company v. National Labor Relations Board*, No. 10372.

6. That affiant has been informed that the decision is in conflict with the decision of this Court upon the question of whether the scope of review of National Labor Board orders and findings was broadened by the 1947 amendments to the National Labor Relations Act.

7. That affiant believes that this decision is of extreme significance in the preparation of respondent's petition for certiorari and supporting brief, and that he desires more time to examine and weigh the effect of this decision.

8. That it is the bona fide intention of respondent in the instant case to make application to the Supreme Court of the United States for a writ of certiorari as promptly as possible, but, that in order to properly prepare the petition for writ of certiorari and the supporting brief in the instant case, respondent needs further time.

9. That A. Norman Somers, Assistant General Counsel of the National Labor Relations Board, has advised me by telephone that the Board is agreeable to a further order of this Court extending for thirty (30) days the time within which respondent must apply for a writ of certiorari; that the National Labor Relations Board has been informed of the fact that respondent is representing its position as indicated in this affidavit.

[fol. 33] 10. That in view of respondent's bona fide intent to apply for writ of certiorari and to promptly prosecute its case if such writ is granted, and in view of the recent significant decision in the Court of Appeals for the Sixth Circuit, and the position of the Board offering no objection to a further stay of thirty (30) days of the order of this

Court, it is submitted that respondent's motion for a further stay of thirty (30) days should be granted.

Frederick R. Livingston.

Sworn to before me this 24th day of February, 1950.
Bertha Ottenheimer, Notary Public, State of New York. Residing in Bronx County. Bronx Co. Clk's No. 26, Reg. No. 52-O-0. N. Y. Co. Clk's No. 146, Reg. No. 163-O-0. Kings Co. Clks. No. 50, Reg. No. 108-O-0. Commission Expires March 30, 1950.

[fol. 34]

EXHIBIT "A"

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 30th day of January, one thousand nine hundred and fifty.

Present: Hon. Learned Hand, Chief Judge; Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

UNIVERSAL CAMERA CORPORATION, Respondent

A motion having been made herein by counsel for respondent to stay execution of the decree of this court,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted on consent on condition that the application for a writ of certiorari be made within thirty days.

Alexander M. Bell, Clerk.

A true copy.

(S.) Alexander M. Bell, Clerk.

[fol. 35] [Endorsed:] 21395. United States Court of Appeals for the Second Circuit. National Labor Relations Board, Petitioner, against Universal Camera Corporation, Respondent. Notice of Motion. Kaye, Scholer, Fierman &

Hays, Attorneys for Respondent, 149 Broadway, New York 6, N. Y. [Stamp:] United States Court of Appeals, Second Circuit. Filed Feb. 27, 1950. A. M. Bell, Clerk.

[fol. 36] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 27th day of February, one thousand nine hundred and fifty.

Present: Hon. Charles E. Clark, Hon. Herbert F. Goodrich, Hon. Jerome N. Frank, Circuit Judges.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

UNIVERSAL CAMERA CORPORATION, Respondent

A motion having been made herein by counsel for respondent to further stay execution of the decree of this court.

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted on condition that the application for a writ of certiorari be made within thirty days from March 1, 1950.

Alexander M. Bell, Clerk.

[fol. 37] [Endorsed:] United States Court of Appeals, Second Circuit. National Labor Relations Board v. Universal Camera Corporation. Order. United States Court of Appeals, Second Circuit. Filed Feb. 27, 1950. Alexander M. Bell, Clerk.

[fol. 38], UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

I, Alexander M. Bell, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing: Part A. pp. 1-6; Part B. pp. 1-90; Part C. pp. 1-53; Part C. pp. 1-37, inclusive, contain a true and complete transcript of the printed portions of record and proceedings had in said Court, in the case of National Labor

Relations Board, Petitioner, against Universal Camera Corporation, Respondent, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 23rd day of March in the year of our Lord one thousand nine hundred and fifty, and of the Independence of the said United States the one hundred and seventy-fourth.

Alexander M. Bell, Clerk. (Seal.)

[fol. 39] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 29, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is assigned for argument immediately following National Labor Relations Board vs. Pittsburgh Steamship Company, No. 732.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9516)

LIBRARY
SUPREME COURT, U.S.

No. 40

Office - Supreme Court, U. S.
FILED
MAR 31 1950

CHARLES ELMORE COPLEY

IN THE

Supreme Court of the United States

October Term, 1950

UNIVERSAL CAMERA CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

KAYE, SCHOLER, FIERMAN & HAYS
Attorneys for Petitioner

JAMES S. HAYS,
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IN THE
Supreme Court of the United States
October Term, 1949

UNIVERSAL CAMERA CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

*To the Honorable, the Chief Justice of the United States,
and the Associate Justices of the Supreme Court of the
United States:*

Universal Camera Corporation, petitioner herein, prays that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit to review the decree of that court entered on January 25, 1950, enforcing an order of the National Labor Relations Board (hereinafter called the "Board"), dated August 31, 1948, under Section 10 of the National Labor Relations Act as amended.

Opinions Below

The findings of fact, conclusions of law and order of the Board are recorded at 79 N. L. R. B. 379 (R. B. 1-8).¹ The opinion of the Court of Appeals is not as yet reported (R. D. 1-10).²

Jurisdiction

The decision of the Court of Appeals was rendered on January 10, 1950 and its decree was entered on January 25, 1950 (R. D. 11). The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947.

Questions Presented

1. Whether the 1947 amendments to the National Labor Relations Act broadened the scope of court review of Board findings and orders.
2. Whether a reviewing court should give any weight to the fact that the Board has reversed the findings of the Trial Examiner.

¹ R. B. designates references to the portions of the record printed below as an appendix to the Board's brief. This was designated "Part B" in the certified transcript of the record in the court below.

² R. D. designates references to the portions of the record printed as proceedings in the United States Court of Appeals, Second Circuit. This was designated "Part D" in the certified transcript of the record in the court below.

3. Whether the Board's Order is supported by substantial evidence on the record considered as a whole, as required by the amended Act.

4. Whether the Board can extend the protection of the Act to a supervisor not an "employee" as defined in the amended Act.

Statutes Involved

The pertinent provisions of the National Labor Relations Act and its amendments and of the Administrative Procedure Act are set forth *infra*, in the appendix.

Statement

The Board's complaint in this case alleged that petitioner had discharged Imre Chairman, a supervisory employee, because he had testified in a representation proceeding (R. B. 11). During the course of that proceeding, which is non-adversary in nature, petitioner publicly announced that it had no adverse interest (R. B. 63). The complaint was based upon charges filed by the individual supervisory employee after the Union, on whose behalf he had testified, had withdrawn charges previously filed by it (R. C. 4, 5, 52-53).³ After a hearing, the Board's Trial Examiner found that the supervisory employee was discharged for causes unrelated to his testimony and he

³ R. C. designates references to the portions of the record printed below as an appendix to the Company's brief. This was designated "Part C" in the certified transcript of the record in the court below.

recommended dismissal of the complaint (R. B. 24-25). The three man panel delegated by the Board to decide this case overruled the Trial Examiner, with one member of the panel dissenting (R. B. 8).⁴ The Board reversed specific findings of the Examiner and found that the company had discharged Chairman because of his testimony and thus violated the Act. After issuance of its order on August 31, 1948, the Board petitioned the Court of Appeals for the Second Circuit for enforcement. On January 10, 1950, the court issued its opinion enforcing the Board's order, with one judge dissenting. The dissenting opinion was as follows:

"In *National Labor Relations Board v. Sartorius & Co.*, 140 F. 2d 203, 205, we said that 'if an administrative agency ignores all the evidence given by one side in a controversy and with studied design gives credence to the testimony of the other side, the findings would be arbitrary and not in accord with the legal requirement.' I think that is what the majority of the board has done in the case at bar. I would reverse its finding of motive and deny enforcement of the order."⁵

Specification of Errors to Be Urged

The court erred:

1. In holding that the 1947 amendments to the National Labor Relations Act did not broaden the scope of review of Board findings and orders.

⁴ Board member James J. Reynolds, Jr., dissented.

⁵ Swan, Circuit Judge, dissenting (R. D. 10).

2. In holding that a reviewing court should completely disregard the fact that the Board has reversed the findings of the Trial Examiner.

3. In holding that the Board's Order was supported by substantial evidence on the record considered as a whole.

4. In holding that the Board can extend the protection of the Act to a supervisor not an "employee" as defined in the Act.

5. In enforcing the Board's Order.

Reasons for Granting the Writ

The questions decided by the court below and presented in the instant petition are important issues of federal law which have not been, but should be, settled by this court.

The resolution of at least two of these questions in the decision of the court below is in conflict with decisions of other courts of appeals on the same matter.

The confusion existing among the various courts of appeals was well recognized by the court below, where the majority stated in part (R. D. 3, 4):

" * * * as a preliminary point arises the extent of our review. * * * This has been a subject of so much uncertainty that we shall not try to clarify it."

1. The court below concluded that the amendments to the 1947 National Labor Relations Act did not broaden

review of Board findings by the courts, but only made "definite what was already implied". It held that its limited function of review offered no choice but to enforce the Board's Order although it felt the Board had erred. (R. D. 9). The court would have refused to enforce the Board's Order if it had applied the correct rule of review. That review was broadened by the 1947 amendments, which included the following pertinent changes: Under the old Act, the Board was not bound to follow the rules of evidence. Under the new Act, Section 10(b) provides:

"Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States."

Section 10(c) of the new Act provides that the decisions of the Board shall be based upon the "preponderance of the testimony", language which did not appear in the old Act. Under the old Act, the courts of appeals were required to enforce Board orders if they were supported by "evidence". Under the new Act, Section 10(e) provides that:

"The findings of the Board with respect to questions of fact if supported by *substantial evidence on the record as a whole* shall be conclusive" (italics added).

This Court in *Pittsburgh Steamship Co. v. National Labor Relations Board*, 337 U. S. 656, recognized that this change of language raised an important question of federal law and, accordingly, remanded the case to the Court of Appeals for the Sixth Circuit for its careful and thorough consideration in the first instance. In the instant case,

the lower court has fully considered and, by a two to one vote, decided the question. Therefore, the decision below squarely presents for resolution an important question of federal law which is, as yet, undetermined by this court. Moreover, the decision below is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit rendered after remand in *Pittsburgh Steamship Company v. National Labor Relations Board*, #10372, February 17, 1950. That court took cognizance of the fact that other courts of appeals, including the court in the instant case, were of the opinion that the 1947 amendments did not enlarge the scope of judicial review, but it observed:

“ . . . these holdings are at variance with *National Labor Relations Board v. Caroline Mills, Inc.*, 167 Fed. (2d) 212, 213 (C. A. 5), and with *National Labor Relations Board v. Tappan Stove Co.*, 174 Fed. (2d) 1007, 1008, in which this court held that the Taft-Hartley Act broadened the Wagner Act as to scope of judicial review.

“We adhere to the decision in *Labor Board v. Tappan Stove Co.* . . . ”

In *National Labor Relations Board v. Caroline Mills*, 167 Fed. (2d) 212, as indicated in the quotation, supra, the Court of Appeals for the Fifth Circuit held that the 1947 amendments were intended to give the courts “more latitude in review”. The decision of the court below also appears to be in conflict with *Victor Mfg. & Casket Co.*, 174 Fed. (2d) 867, in which the Court of Appeals for the Seventh Circuit observed that the amendments, while not providing for a hearing de novo, gave reviewing courts more latitude.

The Board conceded below that the scope of judicial review in a case now coming before a court of appeals for enforcement is controlled by the statute as amended. The court below held that the amendments brought about no change in judicial review. However, it is submitted that the amendments were intended to and did broaden the extent of court review of board findings. Congress, in changing the language of the applicable sections, must have had some intent and its purpose is best illustrated by the conference report which states, in part, as follows:⁶

"The Senate amendment provided that the Board's findings with respect to questions of fact should be conclusive if supported by substantial evidence on the record considered as a whole. The provisions of Section 10(b) of the conference agreement insure the Board's receiving only legal evidence, and section 10(c) insures its deciding in accordance with the preponderance of the evidence. These two statutory requirements in and of themselves give rise to questions of law which the courts will hereafter be called upon to determine—whether the requirements have been met. This, in conjunction with the language of the Senate amendment with respect to the Board's findings of fact—language which the conference agreement adopts—will very materially broaden the scope of the courts' reviewing power. This is not to say that the courts will be required to decide any case de novo themselves weighing the evidence, but they will be under a duty to see that the Board observes the provisions of the earlier sections that it does not infer facts that are not supported by evidence or that are not consistent

⁶ House Conference Report No. 510, 80th Cong., page 56.

with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings. The language also precludes the substitution of expertness for evidence in making decisions. It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in *N. L. R. B. v. Nevada Consol. Copper Corp.* (316 U. S. 105) and in the *Wilson, Columbia Products Union Pacific Stages, Hearst, Republic Aviation, and LeTourneau, etc.*, cases, *supra*, without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into sections 10(e) of the amended act." (italics added).

The limited rule of review adopted by the majority of the court below constitutes the type of abdication to the Board that Congress referred to in the same Conference Report and which it sought to correct by the amendments to the Act. The Conference Report, at page 55, states:

"Under the language of section 10(e) of the present act, findings of the Board, upon court review of Board orders, are conclusive 'if supported by evidence'. By reason of this language, *the courts have*, as one has put it, in effect '*abdicated*' to the Board
 * * * In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and of fact
 * * * or when they rested only on inferences that were not, in turn, supported by facts in the record
 * * *" (italics added).

In adopting the 1947 amendments, Congress obviously meant to prevent the courts from further abdicating to the Board. The court below failed to follow the fundamental rule of statutory interpretation as expressed by Justice Holmes, on circuit, in *Johnson v. United States*, 163 F. 30, 32:

"A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.'"

In holding that Congress "merely made definite what was already implied", the court below in effect said "We see what you are driving at, but you have not said it, and therefore we shall go on as before".

In deciding that review of Board orders had been broadened, the Court of Appeals in the *Pittsburgh Steamship Company* case, *supra*, relied upon the Administrative Procedure Act as well as the amendments to the National Labor Relations Act. Sections 7(c) and 10(e) of the Administrative Procedure Act, in substance, require that every

⁷ Cited with approval in *United States v. Hutcheson*, 312 U. S. 219, 235 and *Vermilya-Broten Co. v. Connell*, 93 L. Ed. 99, 106.

administrative order be issued only upon consideration of the whole record if supported by substantial evidence. If this language in the Administrative Procedure Act is construed to broaden judicial review of administrative orders and findings, then, *a fortiori*, the amendments to the National Labor Relations Act were intended to and do bring about such a result. The legislative history of these amendments clearly indicates that they were drafted in an attempt to make obvious a broader power of review, something which the managers were not sure had been achieved by the already enacted Administrative Procedure Act. The report of the Conference Committee, *supra*, at page 56, stated:

"While the Administrative Procedure Act is generally regarded as having intended to require the courts to examine decisions of administrative agencies far more critically than has been their practice in the past, by reason of a conflict of opinion as to whether it actually does so, a conflict that the courts have not resolved, there was included, both in the House bill and the Senate amendment, language making it clear that the act gives to the courts a real power of review."

The *Pittsburgh Steamship* case illustrates how crucial the change in review can be. In that case this Court indicated that there was sufficient evidence to support the Board's findings under the standards of review applicable before enactment of the Administrative Procedure Act and the 1947 amendments to the Wagner Act. Yet it remanded the case to the court below to consider the effect of these statutes. On remand, the findings were held insufficiently supported by the evidence under the changed standard of

review and the Board's Order was not enforced. Similarly if the court below in the instant case had applied the correct rule of review, it would have refused enforcement of the Board's Order.

Petitioner submits that the problem of scope of review of Board findings and orders is an important issue of federal law on which there is conflict in the courts of appeals dealing with the question. This issue has not been but should be, settled by this Court.

2. The court below held that a reviewing court should completely disregard the fact that the Board has reversed the findings of a Trial Examiner. It conceded that "the standing of an examiner's findings under the Labor Relations Act is not plain" (R. D. 5). It concluded by holding that "* * * although the Board would be wrong in totally disregarding [an examiner's] findings, it is practically impossible for a Court, upon review of those findings which the Board itself substitutes, to consider the Board's reversal as a factor in the court's own decision" (R. D. 7). The court below went on to say that even though it felt that the Board had erred in reversing a finding of the Trial Examiner, it nevertheless was "altogether to disregard this as a factor" in its review (R. D. 8).

The present state of the law is far from clear. The court below observed, after reviewing the cases in point, "All this leaves the question in confusion" (R. D. 6). Yet, it compounded the confusion by holding that no weight should be given to the fact that a Trial Examiner has been reversed, thus leaving the ultimate determination in each

case dependent upon the "competence the Board ascribes to the examiner in question". So vague a standard makes meaningless the right to a hearing before a Trial Examiner whose findings may count for all or naught, depending upon the unexpressed whim of the Board. This could not have been the intent of the Congress which amended Section 10(c) of the Act in 1947 to require examiners, for the first time, to make reports.

The holding of the court below is in conflict with decisions of courts of appeals for other circuits on the same matter. Thus, it is well settled doctrine in other circuits that where the board "reaches a conclusion opposite to that of an examiner, * * * the report of the latter has a bearing on the question of substantial support and materially detracts therefrom." See *Staley Manufacturing Company v. National Labor Relations Board*, 117 F. (2d) 868, 878 (C. C. A. 7) cert. den. 313 U. S. 559. The courts of appeals for the sixth and eighth circuits have come to a similar conclusion. See *Wilson & Co. v. National Labor Relations Board*, 123 F. (2d) 411, 418 (C. C. A. 8), *National Labor Relations Board v. Ohio Calcium Co.*, 133 F. (2d) 721, 724 (C. C. A. 6). The basis for this view is clear: The Trial Examiner has a chance to observe witnesses and judge their credibility which is denied to any reviewing body, be it the agency itself or the courts. Therefore, if the Board substitutes its findings of fact for that of the examiner its lesser opportunity to observe all of the relevant facts should be considered by a court in assessing the Board's findings. The court below conceded the basic principle, at least, when it observed that "obviously no printed record preserves all the evidence, on which any

judicial officer bases his findings; and it is principally on that account that upon an appeal from the judgment of a district court, a court of appeals will hesitate to reverse." However, it could not find any "middle ground" between what it regarded as the two poles: i.e., holding that a Board's reversal of an examiner is, for all practical purposes, to be disregarded by a reviewing court and holding that such reversal is error whenever it would be, if done by a judge to a master in equity (R. D. 7). Accordingly, it adopted the former view as its holding.

It is submitted that not only is the holding incorrect, but the reason for it logically indefensible. It is true that the Act, as amended, does not plainly assimilate examiners to masters, nor does it undertake to state how persuasive their findings should be. Yet the requirement in the new Act that examiners issue reports indicates that the reports are to have some consequence. The holding of the court below, in effect, denies an examiner's findings any significance. Yet the Board itself frequently attaches great weight to such findings, adopting them in its short-form order in many cases. Moreover, the absence of a precise standard defining the weight to be given examiner's findings does not justify disregarding them altogether. Petitioner submits that it is possible to ascribe some weight to the fact that the Board reversed a trial examiner without precisely defining the exact weight to be given. If the court below had done this, its opinion indicates that its decision would have been different. Thus, it pointed out (R. D. 7):

"One ground why the evidence failed to convince the examiner of any agreement between Kende and Weintraub to discharge Chairman, was that he

thought it quite as likely that the quarrel between Weintraub and Chairman at the end of December still rankled in Weintraub's mind, and induced him to insist upon Chairman's discharge on January 24, 1944. It became important in this view to explain why Weintraub waited for over three weeks; and this the examiner did explain because he believed that Politzer had told Weintraub that Chairman was going to resign. When the majority of the Board refused to accept this finding, they concluded that, since this left Weintraub's delay unexplained, his motive was to be related back to the quarrel of Kende and Chairman on November 30. *We should feel obliged in our turn to reverse the reversal of this finding, if we were dealing with the finding of a judge who had reversed the finding of a master, because the reasons given do not seem to us enough to overbear the evidence which the record did not preserve and which may have convinced the examiner.* These were (1) that the examiner did not believe all that Politzer had said; and (2) that the finding was 'irreconcilable with the other related facts and all the other evidence bearing on Politzer's behavior and attitude.' It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all. Nor can we find 'other related facts' which were 'irreconcilable' with believing that Politzer told Weintraub that Chairman was going to resign. Indeed, Chairman himself swore that on January 11, Politzer suggested to him that he resign, which affirmatively serves to confirm the examiner's finding that Politzer told Weintraub that Chairman would resign in order to placate him. However, as we have said, we think that *we are altogether to disregard this as a factor in our re-*

view, which we should confine to the bare record; and on that we cannot say that Politzer's testimony had to be believed, in the face of Chairman's denial that he ever told him that he would resign" (*italics added*).

The Board's reversal of the examiner's findings was unjustified but this was a factor which the court below erroneously failed to regard as significant in its review.

The number of cases in which the Board reverses the findings of an examiner is not negligible. Therefore, the decision below presents an important issue of federal law affecting the administration of the Act. The decision below is also in conflict with decisions of other circuits upon the same question. This issue has not been, but should be, resolved by this Court.

3. The court below improperly enforced the Board's Order since it is not "supported by substantial evidence on the record considered as a whole" as required by the amended Act. An examination of the record before the Board reveals that the Board, in the words of Judge Swan, "ignores all the evidence given by one side" and "with studied design gives credence to the testimony of the other side" (R. D. 10). The Board failed to explain the lack of motive on the part of the company which had no adverse interest in the proceeding in which Chairman testified. It failed to explain why the company, which has had a long history of good labor relations, should select one man who was not a member of the Union as the victim in a dispute in which it had no interest. The Board improperly excluded consideration of the Company's reasons for the discharge

of Chairman who had abused two supervisory employees and accused the vice-president of the company of being a "liar". Finally, as the court below pointed out in detail, the Board reversed the findings of the Trial Examiner without adequate explanation.

The majority of the court below plainly regarded the Board's finding of illegal motive as erroneous although it felt bound to enforce the Board's Order unless "no reasonable person could have concluded that Chairman's testimony was one of the causes of his discharge, little as it would have convinced us, were we free to pass upon the evidence in the first instance" (R. D. 9). The court's self-imposed restrictions negate the legislative intent to expand the scope of review to prevent the Board from concentrating "on any one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings". See Conference Report, *supra*, page 8.

Since the Board's Order is not supported by substantial evidence on the record considered as a whole as required by the amended Act, the court below improperly enforced. Sound administration of the Act requires a reversal and a direction that the court below refuse to enforce an order so patently based on insufficient evidence.

4. The court below improperly extended the protection of the Act to a supervisor not an "employee" as defined in the amended Act. Chairman, a supervisor, was discharged on January 24, 1944. Prior to the issuance of the Board Decision and Order the Act was amended in 1947, specifically excluding supervisors from the definition of "em-

ployees" entitled to the protection of the Act. The court below erroneously relied on the General Savings Statute, 1 U. S. C. 29, in holding that exclusion of supervisors from the protection of the Act did not extinguish respondents "liability". It is submitted that we are not concerned here with penalties or liabilities, but rather with public policy. In amending the Act in 1947 Congress withdrew from supervisory employees the protection it had previously granted them. This was a policy judgment by the legislature in the light of experience under the Act which indicated that "unionization of supervisors undermined stable labor relations.

In *National Labor Relations Board v. Brozen*, 166 F. (2d) 812, 813, the court below denied enforcement of an order to bargain with a union which had not complied with the provisions of the Act requiring filing of non-communist affidavits. The basis of this decision was a reluctance to enforce an order contrary to the policy of the amended Act. The decree of the court enforcing the Board Order in the instant case is inconsistent with the ruling in the *Brozen* case, *supra*. In both cases the petition for enforcement followed the Congressional enactment of certain policy changes. The Congressional intent should have been carried out here in the same manner as in the *Brozen* case.

It is submitted that the decree of the court below enforcing the Board's Order requiring reinstatement and back-pay for a supervisor is contrary to the policy and intent of the Congress and presents an important issue of federal law which has not been, but should be, resolved by this court.

CONCLUSION

Because of the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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March, 1950.

APPENDIX

The relevant provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

3. The term "employee" shall include any employee,

SEC. 10 (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the

question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive.

* * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

2. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp., Secs. 141, *et seq.*) are as follows:

“SEC. 2. When used in this Act—

“(3) The term ‘employee’ shall include any employee, * * * but shall not include any individual employed * * * as a supervisor, * * *.

“(11) The term ‘supervisor’ means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively to recommend such

action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

"SEC. 10. (b) * * * Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

10 (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or

the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize such recommended order shall become the order of the Board and become effective as therein prescribed.

“(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia) or if all the circuit courts of appeals to which application may be made are in vacation any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to

make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." • • •

• • •

"SEC. 14.(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

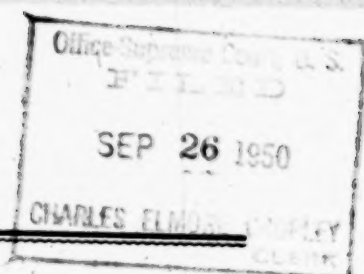
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3. The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*) are as follows:

SEC. 7. (c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. • • •

SEC. 10 (e) Scope of review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 or 8 otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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SUPREME COURT, U. S.



IN THE
Supreme Court of the United States
October Term, 1950

No. 40

UNIVERSAL CAMERA CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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IN THE
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ON WRIT OF CERTIORARI TO THE UNITED STATES
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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The findings of fact, conclusions of law and order of the Board are recorded at 79 NLRB 379 (R. 11-19). The opinion of the Court of Appeals is reported at 179 F. 2d 749 (R. 157-166).

JURISDICTION

The decision of the Court of Appeals was rendered on January 10, 1950 and its decree was entered on January 25, 1950 (R. 167). The petition for certiorari was filed on

March 31, 1950, and was granted on May 29, 1950. The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1254 (1) and Section 10(e) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947.

QUESTIONS PRESENTED

1. Whether the 1947 amendments to the National Labor Relations Act broaden the scope of court review of Board findings and orders.
2. Whether a reviewing court should give any weight to the fact that the Board has reversed the findings of the Trial Examiner.
3. Whether the Board's findings are supported by substantial evidence on the record considered as a whole, as required by the amended act.
4. Whether the Board can extend the protection of the Act to a supervisor not an "employee" as defined in the amended act.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act of 1935 (49 Stat. 449, 29 U. S. C. 151 et seq.), the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. Supp. 11, 141 et seq.) and the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001 et seq.) are set forth infra, in the appendix, pages 54 et seq.

STATEMENT

The Board's complaint in this case alleged that petitioner had discharged Imre Chairman, a supervisor, because he had testified in a representation proceeding (R. 21). The representation proceeding in which Chairman testified arose out of the efforts of the A. F. of L. in 1943 to organize petitioner's maintenance employees (R. 24). Previously in March 1942, petitioner had executed a plantwide agreement with the C. I. O. as a result of a consent election conducted by the Board.¹ Both before and after the efforts of the A. F. of L. to organize its maintenance employees, petitioner had a history of good labor relations, recognizing the right of its employees to self-organization.

The complaint was based upon charges filed by Chairman individually, after the Union, on whose behalf he had testified, had withdrawn charges previously filed by it (R. 107, 108, 155, 156). The facts of the case are best summarized in the opinion of Learned Hand, the presiding judge in the court below² (R. 157-159):

"Chairman was an assistant engineer, whose duties were to supervise the 'maintenance employees,' and he testified at the hearing in favor of their being recognized as a separate bargaining unit, (R. 24, 44, 53, 54).

¹ *Matter of Universal Camera Corporation*, 54 NLRB 1037.

² References to the record have been inserted in the appropriate places. These references did not appear in the opinion of the court below. In addition, where the opinion of the court below referred to the "respondent" the designation has been changed to "the company" for purposes of clarity.

The company opposed the recognition of such a unit, and several of its officers testified to that effect, among whom were Shapiro, the vice-president, Kende, the chief engineer, and Politzer, the 'plant engineer' (R. 24, 44-45, 65, 80). The examiner, who heard the witnesses, was not satisfied that the company's motive in discharging Chairman was reprisal for his testimony; but on review of the record a majority of the Board found the opposite, and on August 31, 1948, ordered Chairman's reinstatement (R. 11, 12, 17, 18, 33).

"The substance of the evidence was as follows: On November 30, 1943, Chairman and Kende testified at the hearing upon representation, after which Kende told Chairman that he had 'perjured' himself; and on the stand in the proceeding at bar Kende testified that Chairman 'was either ignorant of the true facts regarding the organization within the Company . . . or . . . he was deliberately lying, not in one instance, but in many instances, all afternoon'; and 'that there was definite doubt regarding his suitability for a supervisory position of that nature' (R. 25, 26, 45, 64-65). The examiner believed the testimony of Chairman that two other employees, Goldson and Politzer, had cautioned him that the company would take it against him, if he testified for the 'maintenance employees'; and Kende swore that he told another employee, Weintraub—the personnel manager—that he thought that Chairman was a Communist (R. 25, 43-44, 66). After Politzer reported to him on December second or third that this was a mistake, Kende told him to keep an eye on Chairman (R. 26, 66). From all this it is apparent that at the beginning of December Kende was hostile to Chairman; but he took no steps at that time to discharge him.

"Nothing material happened until the very end of that month, when Chairman and Weintraub got into a

quarrel, about disciplining a workman, named Kollisch. Chairman swore that Weintraub demanded that he discharge Kollisch for loafing; and Weintraub swore that he only demanded that Chairman put Kollisch to work (R. 48, 76). In any event, high words followed; Chairman told Weintraub that he was drunk; Weintraub brought up a plant guard to put Chairman out of the premises, and the quarrel remained hot, until one, Zicarelli, a union steward, succeeded in getting the two men to patch up an apparent truce (R. 48-49, 76-77). Two days later Weintraub saw Politzer and told him that he had heard that Politzer was looking into Chairman's statement that Weintraub was drunk, and on this account Weintraub asked Politzer to discharge Chairman (R. 30). Politzer testified that he answered that Chairman was going to resign soon anyway, and this the examiner believed (R. 30). He did not, however, believe Politzer's further testimony that Chairman had in fact told Politzer that he was going to resign; he thought that Politzer either was mistaken in so supposing, or that he had made up the story in order to quiet Weintraub (R. 30-31). Probably his reason for not believing this part of Politzer's testimony was that he accepted Chairman's testimony that ten days later Politzer intimated to Chairman that it would be well for him to resign, and Chairman refused (R. 31). Whatever the reason, Weintraub did not, after his talk with Politzer, press the matter until January 24, 1944, when, learning that Chairman was still in the factory he went again to Politzer and asked why this was (R. 31, 77). When Politzer told him that Chairman had changed his mind, Weintraub insisted that he must resign anyway, and, upon Politzer's refusal to discharge him, they together went to Kende (R. 31, 78). Weintraub repeated his insistence that Chairman must go, giving as the reason that his ac-

cusation of drunkenness had undermined Weintraub's authority. Kende took Weintraub's view and Politzer wrote out an order of dismissal (R. 31, 78). No one testified that at this interview, or any time after December first, any of the three mentioned Chairman's testimony at the representation hearing."

The next day Weintraub informed Chairman that he was discharged for misconduct. Recognizing that his discharge was entirely attributable to his altercation with Weintraub on December 30, Chairman said "For your misconduct, you fired me" (R. 31). Two weeks after his discharge, Chairman stated on an application for a job filed with the United States Employment Service that his employment by petitioner terminated because of "misconduct" (R. 110, 111).

Upon the foregoing facts, the Board's Trial Examiner found that Chairman was discharged for causes unrelated to his testimony and recommended dismissal of the complaint (R. 23, 25). The three-man panel delegated by the Board to decide this case over-ruled the Trial Examiner with one member of the panel dissenting (R. 18).³ The Board reversed specific findings of the examiner and found that the company had discharged Chairman because of his testimony and thus violated the act. The Board ordered petitioner to cease and desist from discriminating against any employee because he had filed charges or given testimony under the act, and to reinstate Chairman with back pay (R. 17, 18).

³ Board Member James J. Reynolds, Jr. dissented.

After issuance of its order, on August 31, 1948, the Board petitioned the Court of Appeals for the Second Circuit for enforcement. Before the court below petitioner contended that the amendments to Section 10 of the National Labor Relations Act had broadened the scope of judicial review of Board findings; that the Board's reversal of the Trial Examiner was a factor detracting from the substantiality of the evidence supporting the Board's findings; that there was no substantial evidence to support these findings under the standard of review applicable either before or after the 1947 amendments; and that the Board could not now validly extend the protection of the Act to a supervisor who is not an "employee" as defined in section 2(3)^o of the amended Act.

The court indicated that if its review were broader it would not enforce the Board order, but it held that the amended Act did not enlarge the scope of court review. It further held that the Board's reversal of the Trial Examiner was to be altogether disregarded in reviewing the Board's findings; that there was substantial evidence to support these findings; and that the discharge of Chairman was preserved by the General Savings Statute despite the amendment to Section 2(3) of the Act (R. 157, 166).

On January 10, 1950, the court below issued its opinion enforcing the Board's order with Judge Swan dissenting. The dissenting opinion was as follows:

"In *National Labor Relations Board v. A. Sartorius & Co.*, 140 F. 2d 203, 205, we said that 'if an administrative agency ignores all the evidence given by one side in a controversy and with studied design gives

credence to the testimony of the other side, the findings would be arbitrary and not in accord with the legal requirement'. I think that is what the majority of the board has done in the case at bar. I would reverse its finding of motive and deny enforcement of the order." (R. 166)

SUMMARY OF ARGUMENT

I.

The 1947 amendments to the National Labor Relations Act broadened the scope of court review of Board findings and orders. The court below indicated that it would have refused to enforce the Board's order if it had had greater latitude in review. The court below erroneously limited its own power of review.

Under the original Act, the Courts of Appeals were required to enforce Board orders if they were supported by "evidence". Under the amended Act, Section 10(e) provides that:

"The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

Petitioner concedes that the changed language is somewhat ambiguous. The legislative history, therefore, becomes pertinent. Congress intended to achieve two objectives: (1) correct certain practices in which the Board had previously engaged, and (2) provide the courts with greater scope of review to insure compliance by the Board with these new requirements. Thus, the Conference Report states that the amendments to the Act are designed to prevent the Board from inferring "facts . . . that are not consistent

with evidence in the record", from concentrating "on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting evidence in conflict with its findings", and from substituting "expertness for evidence". See "Legislative History Labor Management Relations Act, 1947", at 560.

The legislative history of the 1947 amendments further reveals that Congress intended to make certain the broader power of review it originally attempted to provide under the previously enacted Administrative Procedure Act. The Conference Report stated:

"While the Administrative Procedure Act is generally regarded as having intended to require the courts to examine decisions of administrative agencies far more critically than has been their practice in the past, by reason of a conflict of opinion as to whether it actually does so, a conflict that the courts have not resolved, there was included, both in the House bill and the Senate amendment, language making it clear that the act gives to the courts a real power of review." *Id.* at 560.

The court below, Judge Swan dissenting, erred in concluding that the amended Act only made "definite what was already implied".

II.

The court below improperly refused to regard the Board's reversal of its Trial Examiner as a factor in judicial review although it recognized that the Board would be wrong in totally disregarding the examiner's findings. The legislative history of both the Administrative Pro-

cedure Act and the amendments to the National Labor Relations Act show a clear Congressional intent to give the Trial Examiner greater importance in the decision making process. Thus, the Administrative Procedure Act makes the examiner independent of the administrative agency. Section 10(c) of the amended National Labor Relations Act requires Board examiners for the first time to file written reports, and provides further that the examiner's report shall be adopted as the Board decision if exceptions are not filed. This contrasts with the procedure under the old Act where the Board could review the examiner's report upon its own motion or could transfer the case unto itself and issue its own proposed findings. In addition, Section 4(a) of the amended National Labor Relations Act insures the examiner's independence by prohibiting consultation with the Board and by preventing review of his report except by the Board.

The reason for attaching greater significance and authority to the position of examiners was plain. The examiner has an opportunity to observe the demeanor and conduct of witnesses denied to any reviewing body and is, therefore, in a superior position to determine credibility. Nevertheless, the court below concluded that it should "altogether . . . disregard this [the Board's reversal of the examiner] as a factor" in judicial review. In so holding, the court nullified Congressional intent.

III.

The Board's findings are not supported by substantial evidence on the record considered as a whole as required by the amended Act. The Board found that the company discharged Chairman, a supervisor, in violation of the Act because he had testified in a representation proceeding. Its decision is based upon a conclusion that Chairman was discharged approximately eight weeks after his testimony as a result of a conspiracy between Kende and Weintraub, two company officials. The Board's finding of conspiracy rested only on inferences that were not in turn supported by facts in the record. The Trial Examiner, who observed the witnesses, rejected the claim of conspiracy and the Court below, after analyzing the evidence, characterized the finding of conspiracy as "the merest guess."

In arriving at its decision, the Board concentrated on one element of proof and failed to explain the overwhelming evidence of petitioner's lack of motive for the alleged discriminatory discharge. It discredited, without adequate explanation, the company's true reason for the discharge of Chairman, i.e., his abuse of Kende and Weintraub and his characterization of the company's vice-president as a liar. The Board reversed numerous findings of the Trial Examiner on crucial matters of credibility without adequate explanation therefor. In finding an alleged conspiracy, it substituted "expertness" for evidence. The Board thus engaged in practices which the amendments to the Act were designed to eliminate.

The Court below, after review of the evidence, concluded that the Board had inadequate reason for reversing the Trial Examiner and stated:

"Nevertheless, in spite of all this, we shall direct the Board's order to be enforced . . . little as it [the Board's findings] would have convinced us, were we free to pass upon the evidence in the first instance."

Had the Court below applied the correct standard of review, it would have refused enforcement of the Board's order.

IV.

The order of the Board improperly extends the protection of the Act to a supervisor not an "employee" as defined in the amended Act. Chairman, a supervisor, was discharged on January 24, 1944. Prior to the issuance of the Board decision and order, the Act was amended to specifically exclude supervisors from the definition of "employees" entitled to the protection of the Act. The court below erroneously relied on the General Savings Statute in holding that exclusion of supervisors from the protection of the Act did not extinguish the company's liability. It is submitted that we are not concerned here with liabilities but rather with public policy. Congress decided, as a matter of policy, that it was undesirable to permit dual loyalty on the part of supervisors and withdrew the previous protection of the Act from supervisors.

The decision of the court below is inconsistent with its decision in *National Labor Relations Board v. Brozen*, 166

F. 2d 812, wherein it denied enforcement of an order to bargain with a union which had not complied with the provisions of the Act requiring filing of non-communist affidavits. In both cases, the petition for enforcement followed the Congressional enactment of policy changes. The Congressional intent should have been carried out here in the same manner as in the *Brozen* case. The attempt by the Board to enforce its order in the instant case is part of a pattern designed to nullify the Congressional intent by continuing to extend protection of the Act to supervisors. The Board order creates no private right. It is not punitive but remedial. With the change in public policy, the order has no foundation. Accordingly, the order herein should not be enforced.

ARGUMENT

I.

The 1947 amendments to the National Labor Relations Act broaden the scope of review of Board findings and orders.

The court below concluded that the 1947 amendments to the National Labor Relations Act did not broaden the review of Board findings by the courts, but only made "definite what was already implied". It held that its limited function of review offered no choice but to enforce the Board's order although it felt the Board had erred. The opinion of the court below indicates that it would have refused to enforce the Board's order if it had applied the correct rule of review. Thus, as to one of the Board's

findings which reversed a finding of the original examiner, the court observed:

"* * * We should feel obliged in our turn to reverse the reversal of this finding, if we were dealing with the finding of a judge who had reversed the finding of a master, because the reasons given do not seem to us enough to overbear the evidence which the record did not preserve and which may have convinced the examiner." (R. 163)

Similarly, the court said as to another basic Board finding:

"* * * Once more, if this was the finding of a judge, we should be in doubt whether it was sufficiently supported." (R. 164)

Finally, it held that:

"Nevertheless, in spite of all this we shall direct the Board's order to be enforced. . . . We cannot say that, with all these circumstances before him, no reasonable person could have concluded that Chairman's testimony was one of the causes of his discharge, little as it would have convinced us, were we free to pass upon the evidence in the first instance." (R. 165)

Petitioner submits that the court erred in thus limiting its power of review. Review of the Board's orders and findings was broadened by the 1947 amendments, which included the following pertinent changes: under the old Act, the Board was not bound to follow the rules of evidence. Under the new Act, Section 10(b) provides:

"Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States."

Section 10(e) of the new Act provides that the decisions of the Board shall be based upon the "preponderance of the testimony", language which did not appear in the old Act. Under the old Act, the courts of appeals were required to enforce Board orders if they were supported by "evidence". Under the new Act, Section 10(e) provides:

"The findings of the Board with respect to questions of fact if supported by *substantial evidence on the record considered as a whole* shall be conclusive." (emphasis supplied)

The opinion below is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in *Pittsburgh Steamship Company v. National Labor Relations Board*, 180 F. 2d 731, rendered after remand from this Court. The Sixth Circuit took cognizance of the fact that other courts of appeals, including the court below in the instant case, were of the opinion that the 1947 amendments did not enlarge the scope of judicial review, but it "adhered" to its previous holding that "the Taft-Hartley Act broadened the Wagner Act as to scope of judicial review".⁴

The Board conceded below that the scope of judicial review in a case now coming before a court of appeals for enforcement is controlled by the statute as amended, but

⁴ In the following cases other courts of appeals have taken a position similar to that of the court below in the instant case: *Eastern Coal Corp. v. National Labor Relations Board*, 176 F. 2d 131 (C. A. 4); *National Labor Relations Board v. Booker*, 180 F. 2d 727 (C. A. 5); *National Labor Relations Board v. Minnesota Mine & Manufacturing Co.*, 179 F. 2d 323 (C. A. 8); *National Labor Relations Board v. Continental Oil Co.*, 179 F. 2d 552 (C. A. 10); but cf. *Victor Mfg. & Gasket Co. v. National Labor Relations Board*, 174 F. 2d 867 (C. A. 7).

contended that the scope of review remained unchanged. It is submitted that the amendments were intended to and did broaden the extent of court review of Board findings.

In seeking to determine the legislative intent, we must first look to the statutory language. Obviously, Congress changed the language relating to court review. Petitioner concedes that the full meaning of that language is not readily apparent on its ~~face~~. We must, therefore, look to the legislative history of the Act to determine the Congressional intent.

Senator Taft, one of the sponsors of the bill, in discussing the proposal as reported to the Senate by the Senate Committee on Labor and Public Welfare, stated:

"Under this proposal, it is said that the finding of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

In the first place the evidence must be substantial; in the second place, it must still look substantial when viewed in the light of the entire record. That does not go so far as saying that a decision can be reversed on the weight of the evidence. It does not go quite so far as the power given to a circuit court of appeals to review a district-court decision, *but it goes a great deal further than the present law, and gives the court greater opportunity to reverse an obviously unjust decision on the part of the National Labor Relations Board.*" (emphasis supplied) ⁵

⁵ For the convenience of the court, all references to the legislative history of the Act will refer to the two bound volumes compiled by the National Labor Relations Board and printed by the United States Government Printing Office in 1948 entitled "Legislative History of the Labor Management Relations Act, 1947". The quotation of Senator Taft above appears at 1014.

The Conference Committee later accepted the language of the Senate proposal on scope of judicial review. In his explanation of the conference decision as to this provision, Senator Taft stated on the floor of the Senate that:

"The Senate bill left unchanged the existing law with respect to the conduct of Board hearings, but gave additional authority to the courts in review of Board cases by providing that the Board findings must be supported by substantial evidence on the record considered as a whole to be conclusive."⁶

The Congressional intent is best determined from the Conference report, which states, in part, as follows:

"The Senate amendment provided that the Board's findings with respect to questions of fact should be conclusive if supported by substantial evidence on the record considered as a whole. The provisions of Section 10(b) of the conference agreement insure the Board's receiving only legal evidence, and section 10(c) insures its deciding in accordance with the preponderance of the evidence. *These two statutory requirements in and of themselves give rise to questions of law which the courts will hereafter be called upon to determine—whether the requirements have been met. This, in conjunction with the language of the Senate amendment with respect to the Board's findings of fact—language which the conference agreement adopts—will very materially broaden the scope of the courts' reviewing power.* This is not to say that the courts will be required to decide any case de novo themselves weighing the evidence, but they will be under a duty to see that the Board observes the provisions of the earlier sections that it does not infer

⁶ Id., at 1542.

facts that are not supported by evidence or that are not consistent with evidence in the record, *and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings. The language also precludes the substitution of expertness for evidence in making decisions.*" (emphasis supplied)⁷

Thus, Congress clearly intended by the amendments to rectify and eliminate certain practices in which the Board had previously engaged.

As a safeguard against decisions based upon administrative zeal rather than objective justice, the original Wagner Act provided that Board orders were not self-executing. In 1947, Congress concluded that there had been a judicial propensity to abdicate to the "expertness" of the Board, despite the original expression of its intent that Board orders be carefully reviewed. The legislative history of the 1947 amendments reveals a Congressional intent to put a brake upon this trend. The amendments thus granted a greater power of review to the courts to enable them to enforce more readily the new requirements imposed upon the Board by the amended statute. Thus, the Conference Report states:

"Under the language of section 10(e) of the present act, findings of the Board, upon court review of Board orders, are conclusive 'if supported by evidence'. By reason of this language, *the courts have*, as one has put it, in effect '*abdicated*' to the Board. . . . In many instances deference on the part of the courts

⁷ Id. at 560.

to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and fact . . . or when they rested only on inferences that were not, in turn, supported by facts in the record . . .” (emphasis supplied)⁸

The limited rule of review adopted by the majority of the court below constitutes the type of abdication to the Board that Congress sought to prevent. The court below, by disregarding the clear legislative intent to enlarge the scope of court review, failed to follow the fundamental rule of statutory interpretation as expressed by Justice Holmes, on circuit, in *Johnson v. United States*, 163 F. 30, 32:

“A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.”⁹

In holding that Congress merely made “definite what was already implied”, the court below in effect said, “We see

⁸ Id. at 559.

⁹ Cited with approval in *United States v. Hutcheson*, 312 U. S. 219, 235 and *Vermilya-Brown Co. v. Connell*, 335 U. S. 377, 388.

what you are driving at, but you have not said it, and therefore we shall go on as before". Nor is it any answer to say, as the Board did in its brief on remand in the *Pittsburgh Steamship* case,¹⁰ and may urge again:

"Although many members of Congress thought that the scope of review was being broadened, this resulted from the fact that they were not fully familiar with the decisions of the Supreme Court and the courts of appeals, and thus incorrectly assumed that the scope of review was narrower than it really was."
(footnote omitted)

If Congress believed, even erroneously, that the courts had been too lax in review of Board action and consequently legislated more searching standards of review, its desire must be respected. It is no answer to say that Congress did not know what it was doing. If its basic conception of the then applicable power to review was incorrect, and petitioner does not concede this, the wisdom of enacting even broader standards of review may well be open to question. However, the issue before this Court is not the desirability of the 1947 amendments but their legal effect.

In deciding that review of Board findings had been broadened, the Court of Appeals in the *Pittsburgh Steamship Company* case relied upon the Administrative Procedure Act as well as the amendments to the National Labor Relations Act. Sections 7(c) and 10(e) of the Administrative Procedure Act, in substance, require that every administrative order be issued only upon consideration of the whole record if supported by substantial evidence. If

¹⁰ Board's brief, at 36, in *Pittsburgh Steamship Company v. N. L. R. B.*, 180 F. 2d 731 (C. A. 6).

this language in the Administrative Procedure Act is construed to broaden judicial review of administrative orders and findings, then, *a fortiori*, the amendments to the National Labor Relations Act were intended to and do bring about such a result.

The legislative history of these amendments clearly indicates that they were drafted in an attempt to make obvious a broader power of review, something which the managers were not sure had been achieved by the previously enacted Administrative Procedure Act. The report of the Conference Committee stated:

"While the Administrative Procedure Act is generally regarded as having intended to require the courts to examine decisions of administrative agencies far more critically than has been their practice in the past, by reason of a conflict of opinion as to whether it actually does so, a conflict that the courts have not resolved, there was included, both in the House bill and the Senate amendment, language making it clear that the act gives to the courts a real power of review."¹¹

Congress clearly intended to establish a statutory pattern for the Board unique to that agency as distinguished from other administrative agencies and designed to cope with the specific problems within the jurisdiction of the Board.¹²

¹¹ Legislative History of the Labor Management Relations Act, 1947", at 560.

¹² This was recognized by the President in his veto message when he pointed out that the 1947 amendments: "* * * would strait-jacket the National Labor Relations Board's operations by a series of special restrictions unknown to any other quasi-judicial agency." "Legislative History of the Labor Management Relations Act, 1947" at 918. The President's veto was overridden by both Houses of Congress.

In its brief in the *Pittsburgh Steamship* case on remand, the Board analyzed in great detail the standards which might be applicable to review of Board findings. In the event that the Board relies upon this analysis in the instant case, petitioner points out that the conclusions reached by the Board in its brief did not exhaust the possibilities. Thus, the Board argued that there are three familiar standards of review: review de novo, the "clearly erroneous" test, and the substantial evidence rule. It concluded that since Congress clearly did not intend the courts to use either of the first two tests in reviewing Board findings, the substantial evidence rule, as construed in such cases as *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 229, was the applicable standard. However, it is obvious that Congress intended to adhere to the substantial evidence rule generally, while, at the same time, it set up certain specific additional tests for the Board to meet and for the courts to enforce. Thus, it is clear from the legislative history discussed in detail above that Congress intended that the Board correct certain practices in which it had previously engaged, e.g., concentrating on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence in conflict with its findings; substituting expertness for evidence in making decisions; or resting findings on inferences unsupported by facts in the record. Petitioner submits that the Board's brief is limited

to an analysis of the conventional standards of review prior to the amendment of the Act. Congress, however, has exercised its power to establish certain requirements for a specific agency and has called upon the courts to enforce those requirements in reviewing the Board's decision.¹³

From all of the above, petitioner submits that the amended Act did not, as the court below held, merely make "definite what was already implied". On the contrary, the Labor Management Relations Act of 1947 introduces new requirements to be followed by the Board in issuing its decisions and orders and enlarges the scope of court review in order to insure compliance by the Board with those requirements.

II.

A reviewing court should not completely disregard the fact that the Board reversed the Trial Examiner.

The court below held that a reviewing court should completely ignore the fact that the Board reversed the findings of the Trial Examiner. The court below conceded that " * * * the Board would be wrong in totally disregarding (an examiner's) findings * * *" (R. 163). Nevertheless, it concluded that a court should "altogether . . . disregard this as a factor" in its review (R. 164). This holding

¹³ Cf. Archibald Cox, "Some Aspects of the Labor Management Relations Act, 1947," 61 Harv. L. Rev. 1, 38-39; Case noted, "Effect of LMRA on Judicial Review of NLRB Decision", 50 Col. L. Rev. 108.

nullifies the Congressional intent to attach great weight to the reports of Trial Examiners and disregards the judicial pattern established by Congress for the Board and its examiners.

A. Status of examiner's report prior to the Administrative Procedure Act and the 1947 amendments to the National Labor Relations Act.

Under the original National Labor Relations Act, "examiners" were provided for but there was no statutory requirement that they make reports.¹⁴ As a practical matter, examiners ordinarily did render intermediate reports. However, the flexible and informal manner in which these reports were sometimes rendered is described in the Board's Fourth Annual Report:

"* * * The trial examiners may, and frequently do, consult with the Chief Trial Examiner upon matters arising during the course of the hearing. These matters usually have to do with motions for adjournment, but frequently problems unfamiliar to the particular trial examiner, with which the Chief Trial Examiner, by reason of his constant familiarity with all the Board's pending cases and procedure, generally has had experience, are discussed with the Chief Trial Examiner. This may be either by telephone, telegraph, or letter. In short, the trial examiners are perfectly free to, and do, consult with the Chief Trial Examiner upon any matter arising during the course of the hearing, the ultimate responsibility for the proper conduct of which rests with the Chief Trial Examiner."¹⁵

¹⁴ Title 29 U. S. C. Section 154.

¹⁵ Fourth Annual Report of the National Labor Relations Board, 1939, at 149 (U. S. Government Printing Office, 1940).

The Board had the power to transfer the case to itself and issue proposed findings of fact and a proposed order in lieu of a trial examiner's intermediate report.¹⁶

Similarly, the inclusion of these reports in the record had been treated by the courts as a matter of indifference in cases involving another administrative body. *FTC v. Hires Turner Glass Co.*, 81 F. 2d 362 (C. A. 3); *Arrow-Hart & Hegeman Electric Co. v. FTC*, 63 F. 2d 108 (C. A. 2) (petition to include examiner's report in record denied); cf. *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 350 (lack of intermediate report not denial of due process). If made, an examiner's report was treated only as a recommendation and some courts were of the opinion that the finding reached therein in no way prejudiced the Board's freedom of decision. *National Labor Relations Board v. Oregon Worsted Co.*, 94 F. 2d 671, 672 (C. A. 9); *National Labor Relations Board v. Botany Worsted Mills*, 133 F. 2d 876, 882 (C. A. 3). In the latter case, the Court of Appeals for the Third Circuit characterized the Trial Examiner as follows:

"The trial examiner is the agent of the Board who gathers facts and, in a complaint proceeding, makes findings and recommendations presented to the Board as an intermediate report. Unlike judges, trial examiners may be substituted at the will of the Board during the course of either representation or complaint proceedings. In both the representation and complaint

¹⁶ National Labor Relations Board Rules and Regulations, Series 2 as amended, effective September 6, 1941, Rules 35 and 37. Contained also in the Rules and Regulations effective October 28, 1942 and November 26, 1943, respectively.

proceedings all the pleadings, notices, rulings, orders, stenographic records, exhibits, documents and depositions constitute the record before the Board. The trial examiner's intermediate report is merely advisory and the Board may accept or reject it. Indeed, the latest commentators upon the subject have said that the report of the trial examiner is to be regarded as in the nature of an 'inter-office memorandum', whose presence or absence does not or should not affect the result of the case being determined by the agency tribunal. Pike and Fischer, *Administrative Law*, Sec. 63a. 16." (footnotes omitted) ¹⁷

Despite the extreme view indicated by the *Botany Worsted* decision, some Courts of Appeals held that where the Board "reaches a conclusion opposite to that of an examiner . . . the report of the latter has a bearing on the question of substantial support and materially detracts therefrom." See *Staley Manufacturing Company v. National Labor Relations Board*, 117 F. 2d, 868, 878 (C. A. 7). The Courts of Appeals for the Sixth and Eighth Circuits came to a similar conclusion. See *Wilson & Co. v. National Labor Relations Board*, 123 F. 2d 411, 418 (C. A. 8); *National Labor Relations Board v. Ohio Calcium Co.*, 133 F. 2d 721, 724 (C. A. 6).

Thus, prior to the Administrative Procedure Act, the status of an examiner's report was at best uncertain, with some courts taking a view that it was a mere "inter-office memorandum".

¹⁷ *National Labor Relations Board v. Botany Worsted Mills*, 133 F. 2d 876, 882.

B. Effect of Administrative Procedure Act and amendments to the National Labor Relations Act of 1947.

In the Administrative Procedure Act, Congress increased the importance of the function of hearing officers generally and surrounded them with safeguards to insure their competence and freedom of judgment. Thus, Section 11 of the Act provides that:

“* * * there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings . . . who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended * * *.”

The intent of these requirements is clearly expressed in the Senate Report on the Administrative Procedure Act which stated:

“That examiners be ‘qualified and competent’ requires the Civil Service Commission to fix appropriate qualifications and the agencies to seek fit persons. In view of the tenure and compensation requirements of the section, designed to make examiners largely independent, self-interest and due concern for the proper performance of public functions will inevitably

move agencies to secure the highest type of examiners.

“The purpose of this section is to render examiners independent and secure in their tenure and compensation. The section thus takes a different ground than the present situation, in which examiners are mere employees of an agency, and other proposals for a completely separate ‘examiners’ pool’ from which agencies might draw for hearing officers.”¹⁸

In addition, Section 8(a) of the Administrative Procedure Act states that where agencies undertake to make initial decisions but have not held a hearing themselves, with certain exceptions not relevant here, the qualified hearing officer or officers “shall first recommend a decision”. The section also provides that on appeal from or review of the decision of an officer who has presided at a hearing, “the agency shall . . . have all the powers which it would have in making the initial decision”. In discussing this provision of the Administrative Procedure Act, the Senate Committee Report stated as follows:

“The provision that on agency review of initial examiners’ decisions the agency shall have all the powers it would have had in making the initial decision does not mean that the initial examiners’ decisions (or their recommended decisions) are without effect. They become a part of the record in the case. *They would be of consequence, for example, to the extent that material facts in any case depend on the determination of credi-*

¹⁸ Senate Report 752 on Administrative Procedure Act printed in “Administrative Procedure Act, Legislative History”, S. Doc. 248, 79th Cong., 2d Sess. at 215.

bility of witnesses as shown by their demeanor or conduct at the hearing. Since the examiner system is made necessary because agencies themselves cannot hear cases, some device must be used to bridge the gap between the officials who hear and those who decide cases." (emphasis supplied) ¹⁹

The House Report contained the same comment, adding, however, that "in a broad sense the agencies' reviewing powers are to be compared with that of courts under Section 10(a) of the Bill."²⁰

In amending the National Labor Relations Act in 1947, Congress even more clearly intended that the function of the Trial Examiner be an important one and his written report a substantial factor in the ultimate disposition of a case. Thus, Section 10(c) of the amended Act requires Trial Examiners to make written reports, something the original Act did not require. In addition, under the old Act, the Board could review upon its own motion or could issue proposed findings in lieu of a Trial Examiner's report.²¹ However, Section 10(c) now provides that if no exceptions are filed with the Board within twenty days of the date on which the trial examiner's recommendations are served upon the parties, "such recommended order shall become the order of the Board and become effective as therein prescribed." Therefore, under the amended Act,

¹⁹ Id. at 210.

²⁰ Id. at 273.

²¹ National Labor Relations Board Rules and Regulations, Series 2 as amended, effective September 6, 1941, Rules 35 and 37. Contained also in the Rules and Regulations effective October 28, 1942 and November 26, 1943, respectively.

the Board must adopt the Trial Examiner's findings and cannot review unless exceptions have been filed.²² Similarly, Congress severed any personal relationship between the Board and its Trial Examiners with respect to the disposition of cases originally heard by them and thereafter brought to the Board. Thus, Section 4(a) now provides that:

"No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations."

The reasons for these changes in the status and functioning of the Trial Examiner under the Labor Act are made clear by the legislative history of the 1947 amendments. Thus, the Senate Report on the language which ultimately was enacted, states:

"Since it is the belief of the committee that Congress intended the Board to function like a court, this bill eliminates the Review Section. In its place each Board member may have as many legal assistants of his own as is necessary to review transcripts and assist him in the drafting of the opinions on cases to which he is assigned. Since the Board's function is largely a judicial one, conformance with the practices of appellate courts in this respect should make for decisions which will truly represent the considered opinions of the Board members."

²² Under this provision, in the fiscal year ending June 30, 1949, the Trial Examiner's recommendations automatically became Board decisions in forty-four cases. See 14th Annual Report of the National Labor Relations Board, 1949, at 11.

"A corollary to this reform relates to the Trial Examining Division. *Tremendous responsibility rests upon the judgment of the individual Trial Examiner who is sent by the Board to the field to hear contested cases, appraise the credibility of the witnesses, resolve conflicts in testimony, make findings of fact and recommendations for Board decision.* Under current practice, before a trial examiner issues his report to the parties, its contents are reviewed and frequently changed or influenced by the supervisory employees in the Trial Examining Division. Yet, since the report is signed only by the trial examiner, the Board holds him out as the sole person who has made a judgment on the evidence developed at the hearing. In the first *Morgan* case (298 U. S. 468, at 480-481), one of the leading decisions on administrative law, the Supreme Court enunciated the following principle:

If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given . . . The one who decides must hear.

This necessary rule does not preclude . . . obtaining the aid of assistants.

"It would be difficult to think of a practice which does greater violence to this principle. Consequently, the committee bill prohibits any of the staff from influencing or reviewing the trial examiner's report in advance of publication, thereby obviating the need for reviewing personnel in the Trial Examining Division." (emphasis supplied) ²³

The cumulative effect of all of these changes in personnel procedure and functions of the Board is described by the

²³ Legislative History of Labor Management Relations Act, 1947, at 415.

Conference Report on the amendments to the Labor Act, which states that:

“The combination of the provisions dealing with the authority of the General Counsel, the provision abolishing the Board’s review division, and the provisions relating to the trial examiners and their reports effectively limits the Board to the performance of quasi-judicial functions.”²⁴

It is clear then from the legislative history of the pertinent provisions in the Administrative Procedure Act and the Labor Management Relations Act, 1947, that the requirement that examiners issue written reports was part of a legislative direction that these reports be regarded as significant. The basis of the requirement is clear: the Trial Examiner has a chance to observe witnesses and judge their credibility which is denied any reviewing body, be it the agency itself or the courts. Therefore, if the Board substitutes its findings of fact for that of the examiner, its lesser opportunity to observe all the relevant facts should be considered by the court assessing the Board’s findings. The court below admitted that the Board would be wrong in totally disregarding the examiner’s findings, but improperly refused to inquire whether the Board committed that error in the instant case (R. 164). The holding that no weight should be given to the fact that the Board has reversed the Trial Examiner makes meaningless his written report and his findings, which may count for all or naught, depending upon the unexpressed whim of the Board. This was not the intent of Congress, and, in effect, nullifies the statutory scheme.

²⁴ Id at 541.

Moreover, the justification of the court below for its holding is logically indefensible. The court below could not find any "middle ground" between what it regarded as the two poles: i.e., holding ~~that~~ a Board's reversal of an examiner is, for all practical purposes, to be disregarded by a reviewing court and holding that such reversal is error whenever it would be, if done by a judge to a master in equity. Accordingly, it adopted the former view as its holding. Thus, it said:

"The weight to be given to another person's conclusion from evidence that has disappeared, depends altogether upon one's confidence in his judicial powers. The decision of a child of ten would count for nothing; that of an experienced master would count for much. Unless we are to set up some canon, universally applicable, like that of Rule 53(e)(2), each case in this statute will depend upon what competence the Board ascribes to the examiner in question. Section 4(a) provides that he shall be an employee of the Board, which will therefore have means of informing itself about his work. We hold that, although the Board would be wrong in totally disregarding his findings, it is practically impossible for a court, upon review of those findings which the Board itself substitutes, to consider the Board's reversal as a factor in the court's own decision. This we say, because we cannot find any middle ground between doing that and treating such a reversal as error, whenever it would be such, if done by a judge to a master in equity.

* * *

"However, as we have said, we think that we are altogether to disregard this [Board's reversal of the examiner] as a factor in our review . . ." (footnotes omitted) (R. 163-164)

In thus disregarding the Board's reversal of the examiner as a factor in its review, the court below, in effect, treated the examiner's report as an inter-office memorandum. It thus failed to assess properly the new standards of competence, skill, and independence established for examiners under the Administrative Procedure Act and the 1947 amendments to the Labor Act. Since "Congress intended the Board to function like a court",²⁵ petitioner submits that the examiner should assume the same relationship to the Board as does a master *vis a vis* a court.

However, assuming *arguendo* that the relationship is not analagous, this does not justify altogether disregarding the Board's reversal of the examiner's findings merely because the court was unable to find some other precisely applicable standard. The absence of a precise standard did not deter the Courts of Appeals for the Sixth, Seventh and Eighth Circuits from concluding that the reversal of an examiner's report "... has a bearing on the question of substantial support and materially detracts therefrom."²⁶ Furthermore, the law presents similar situations: thus, a judge may instruct a jury to take into account a witness' motive in testifying without precisely defining the exact weight to be given to that factor. Petitioner submits that it is possible to ascribe some importance to the fact that the Board reversed a Trial Examiner without precisely de-

²⁵ Legislative History of the Labor Management Relations Act, 1947, at 415.

²⁶ See *Staley Manufacturing Company v. National Labor Relations Board*, 117 F. 2d 868, 878 (C. A. 7); accord: see *National Labor Relations Board v. Ohio Calcium Co.*, 133 F. 2d 721, 724 (C. A. 6); *Wilson & Co. v. National Labor Relations Board*, 123 F. 2d 411, 418 (C. A. 8).

fining it. Difficulty in determining the weight to be given this factor does not justify giving it no weight at all.

From all of the above, petitioner submits that Congress, in the Administrative Procedure Act and the 1947 amendments to the Labor Relations Act, clearly intended to attach great importance to the reports of the Trial Examiner and to create a judicial pattern for the Board and its examiners. The decision of the court below that a court should completely disregard the fact that the Board reversed an examiner nullifies the Congressional intent. Petitioner contends that a reviewing court must, as a matter of law, give weight to the reversal of an examiner in assessing the substantiality of the Board's findings.

III.

The Board's findings are not supported by substantial evidence on the record considered as a whole, as required by the amended Act.

The report of the Conference Committee dealing with the 1947 amendments to the National Labor Relations Act, quoted above at page 17 of this brief, clearly indicates that the amendments were designed specifically to rectify and eliminate certain practices of the Board. Thus, under the amended statute, the Board cannot concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons; it cannot substitute its own expertness for evidence in deciding cases nor can it discredit evidence that is in conflict with its findings without adequate explanation. It is the duty of a reviewing court under the amended statute to prevent the Board from

engaging in any of these practices and to refuse enforcement of an order based upon a decision so rendered.

Yet, an examination of the record before the Board reveals that the Board, in the words of Judge Swan, "ignores all the evidence given by one side . . . and with studied design gives credence to the testimony of the other side" (R. 166). In sum, the record reveals that the Board continued to engage in practices which the amendments had been designed to eliminate. Thus, in its decision, the Board failed to explain petitioner's lack of motive for the alleged discriminatory discharge; it concentrated on one element of proof—an alleged statement of a supervisor, Politzer—as support for its decision; it substituted expertness for evidence in intuitively deciding that there had been a conspiracy to discharge Chairman and it reversed important findings of the Trial Examiner without adequate explanation.

The majority of the Court below, although it reluctantly enforced the Board's order, observed that the evidence relied on by the Board would not have convinced it "in the first instance" (R. 165). It is apparent that under the applicable standard of review, the Board's order is not supported by substantial evidence on the record considered as a whole, as required by the amended Act.

A. The Board failed to explain petitioner's lack of motive for the alleged discriminatory discharge and concentrated on one element of proof in reaching its decision.

Prior to the enactment of the National Labor Relations Act, employers were free to discharge employees for any reason whatsoever. Upon the adoption of that Act, this

right was limited in only one respect—employers can no longer discharge an employee for activities related to a Union. The Taft-Hartley Act has left this part of the Act unchanged. Therefore, the Board's order in the instant case can be enforced only if petitioner's basic right to discharge Chairman was rendered illegal by a motive proscribed by the Act. The crucial factor in this proceeding, therefore, revolves around the issue of motive. It is undisputed that Chairman testified in a Board proceeding and that he was discharged. The third element of illegal motive is unsupported in the record.

In reaching its conclusion, the Board failed to explain the lack of discriminatory motive on the part of a company which had no adverse interest in the proceeding in which Chairman testified. It failed to explain why the company, which has had a long history of good labor relations, should select one man who was not a member of the Union as the victim in a dispute in which it had no interest. The absence of the company's hostility to a Union is material in considering Chairman's discharge.²⁷ Petitioner fully recognized the rights of its employees to self-organization, promptly negotiated collective bargaining agreements with both the A.F.L. and C.I.O. unions and established satisfactory labor relations with both.—Surely if the company had as its motive the destruction of the A.F.L. union in

²⁷ In cases involving company domination of and interference with a labor organization in violation of Section 8(2) (now Section 8(a)(2)), the employer's known lack of hostility and favorable attitude toward employee's freedom of organization has been regarded as a basis for relieving him from responsibility for conduct of supervisors. *National Labor Relations Board v. Sun Shipbuilding and Dry Docks Co.*, 135 F. 2d 15, 20, 21 (C. A. 3).

favor of the C.I.O., with whom it then had a contract, it would not have acted against Chairman who was not even a member of the union.

The Board gave inadequate consideration to the Company's reason for the discharge of Chairman who had abused two supervisory employees and accused the vice-president of the Company of being a liar. Instead, the Board concentrated on one element of proof as evidence of the Company's animus against Chairman for testifying—its finding that Politzer told Chairman that the Company would not like it if Chairman testified. Politzer denied making this statement. There is no evidence of encouragement, authorization or ratification of Politzer's alleged statement to Chairman. On the contrary, the only testimony on the point is that it was unauthorized (R. 139, 140). Nor is there any basis on which Chairman could reasonably believe that Politzer, in making the statements, was acting on behalf of petitioner. Chairman had previously heard Politzer's opinion that petitioner had no objection to the Union, and as a supervisor he knew petitioner was not engaged in any activity to prevent organization of the maintenance employees by the Union.²⁸

²⁸ Moreover, Politzer and Chairman were both supervisors. The Board has formulated the principle that supervisors in their conversations with one another may be deemed to speak as representatives of management only if it was shown that management encouraged, authorized or ratified their statements. *Matter of R. R. Donnelly Sons*, 60 NLRB 635; *Matter of the B. F. Goodrich Company*, 64 NLRB 1303.

B. The Board substituted expertness for evidence.

An examination of the record before the Board indicates that it indulged in a practice which the 1947 amendments were specifically designed to eliminate. Thus, the report of the Conference Committee, in discussing the effect of the amendments, pointed out that:

"Making the 'preponderance' test a statutory requirement will, it is believed, have important effects. For example, evidence could not be considered as meeting the 'preponderance' test merely by the drawing of 'expert' inferences therefrom, where it would not meet that test otherwise . . ."

"The language [of the amendments] also precludes the substitution of expertness for evidence in making decisions." ²⁹

It is most significant that the crux of the Board's reasoning is relegated to a footnote, which reveals that its decision is based upon a "conviction", not facts. That footnote states:

"We agree that, for all that appears, Weintraub's animosity toward Chairman, exhibited during their apparently fortuitous encounter on December 30, was not specifically attributable to Chairman's testimony at the Board hearing. It is also true that there is no *direct* evidence of an explicit understanding between Kende and Weintraub, subsequent to the conference on December 1, that Weintraub would either create the

²⁹ "Legislative History of the Labor Management Relations Act, 1947", at 558, 560.

December 30 incident itself, or exploit that particular incident as the basis for Chairman's discharge. *However, the absence of direct and detailed evidence of such a conspiracy, as the Trial Examiner suggests and finds unproved, does not militate against our conviction that it was actually because of Chairman's testimony at the Board hearing, and only ostensibly because of the resurrected December 30 episode, that Weintraub and Kende brought about Chairman's discharge.* On the evidence before us, we have no substantial doubt that discrimination occurred; neither in this, nor in any similar case, is it necessary that we have positive proof blueprinting the *method* whereby that discrimination was planned and accomplished." (emphasis partially supplied) (R. 14)

The Board's decision strains to arrive at a finding of conspiracy between Weintraub and Kende to discharge Chairman. It fails to explain Weintraub's defense of Chairman at the December 1 conference when Kende suggested that Chairman was a Communist (R. 26). It ignores the fact that Weintraub's change in feelings toward Chairman was based on the abuse he received at the latter's hands on December 30. The Trial Examiner found of the December 1 conference that "there is no proof that the conference resulted in any plan for Chairman's discharge" (R. 32). The opinion of the majority below pointed out that "No one testified that at this interview, or any time after December first, any of the three [Weintraub, Kende and Politzer] mentioned Chairman's testimony at the representation hearing" (R. 159). It is clear that the Board's "conviction" that such a conspiracy occurred is based upon an inference not supported by any facts in the record.

Congress intended that the Courts be given additional power to prevent the exercise of such "expertness" in the future. The Conference Report stated:

"It is believed that the provisions of the Conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in *N. L. R. B. v. Nevada Consol. Copper Corp.* . . . and in the *Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic Aviation* and *LeTourneau*, etc. cases, supra, without unduly burdening the courts."³⁰

At least four of the cases referred to involved situations where the Board relied upon "expertness" to justify its conclusion.³¹ In the *Columbia Products Corp.* case, the court below, just as in the instant case, felt compelled to accept a Board finding as to the motive for a discharge even though such a finding might "strain" its credulity. In the *Standard Oil Company* case, which was also decided by the court below, the opinion emphasized that as the National Labor Relations Act was then written, a circuit court was compelled, in effect, to accept "an abdication of any power to review" factual issues decided by the Board. The Court recognized that the rationale for this point of view was the alleged expertness of the Board.³² However accurate this analysis may have been at the time, the 1947

³⁰ Id. at page 560.

³¹ *National Labor Relations Board v. Standard Oil Company*, 138 F. 2d 885 (C. A. 2); *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793; *National Labor Relations Board v. LeTourneau Company*, 324 U. S. 793; and *National Labor Relations Board v. Columbia Products Corp.*, 141 F. 2d 687 (C. A. 2).

³² See *National Labor Relations Board v. Standard Oil Company*, 138 F. 2d 885, 887 (C. A. 2).

amendments have changed the law so that the Board must now base its findings on evidence in the record and not upon "expertness" or "convictions"; and the courts must refuse to enforce orders based on findings which do not meet this standard.

C. The Board reversed important findings of the Trial Examiner without adequate explanation.

In Point II, pages 23 to 35 of this brief, the holding of the court below that a reviewing court should completely disregard the Board's reversal of the Trial Examiner has been urged as an independent ground for reversal of the decision below. The principal point urged there was that the holding of the court below nullifies congressional intent.

The Board may, of course, reverse its Trial Examiner. However, under the amended Act when it does so, it must give adequate explanation. This the Board failed to do.

It is significant to note the specific points upon which the Board's findings differed from those of the Trial Examiner since it is precisely in those situations where judgment of credibility is crucial that the Board and the Trial Examiner reach contrary conclusions. Some of the Trial Examiner's findings with which the Board disagreed are as follows:

<p>The Trial Examiner found that the evidence failed to sustain the allegation that Chairman was discharged for testifying at the representation proceeding (R. 33).</p>	<p>The Board "disagreed" (R. 11).</p>
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The Trial Examiner found that the conference of December 1st between Kende, Weintraub and Politzer did not result in "any plan for Chairman's discharge" (R. 32).

The majority of the Board stated "we do not adopt the Trial Examiner's appraisal of this incident" (R. 13).

The Trial Examiner found that "The contention of the Board that Kende and Weintraub entered into some arrangement to discharge Chairman on a pretext has little basis in the actual testimony and rests principally on surmise" (R. 33).

The Board felt that "absence of direct and detailed evidence of such a conspiracy, as the Trial Examiner suggests and feels unproved, does not mitigate against our conviction that it was actually because of Chairman's testimony at the Board hearing and only ostensibly because of the resurrected December 30 episode that Weintraub and Kende brought about Chairman's discharge" (R. 15).

The Trial Examiner believed Politzer's statement that he told Weintraub, two days after the fight on New Year's Eve, that Chairman was going to resign (R. 33).

The Board flatly reversed this finding without explaining Chairman's admission that Politzer had requested his resignation (R. 14).

The Trial Examiner said that the credited testimony indicates that Weintraub "chose to make an issue" of the December 30 episode which he had promised to "forget" when he learned that Politzer was investigating his (Weintraub's conduct (R. 33).

The Board states that "there is . . . no plausible support for the Trial Examiner's conclusion" (R. 14).

The Trial Examiner found that Chairman was discharged on an evaluation of the merits of Weintraub's request for Chairman's discharge (R. 33).

The Board flatly found to the contrary (R. 15).

The Board's explanations for overruling the Examiner on these crucial points were completely inadequate. The opinion of the court below observed at length that the Board's reasons for reversal were unjustified. Thus, the Court below pointed out:

"One ground why the evidence failed to convince the examiner of any agreement between Kende and Weintraub to discharge Chairman, was that he thought it quite as likely that the quarrel between Weintraub and Chairman at the end of December still rankled in Weintraub's mind, and induced him to insist upon Chairman's discharge on January 24, 1944. It became important in this view to explain why Weintraub waited for over three weeks; and this the examiner did explain because he believed that Politzer had told Weintraub that Chairman was going to resign. When the majority of the Board refused to accept this find-

ing, they concluded that, since this left Weintraub's delay unexplained, his motive was to be related back to the quarrel of Kende and Chairman on November 30. *We should feel obligated in our turn to reverse the reversal of this finding, if we were dealing with the finding of a judge who had reversed the finding of a master, because the reasons given do not seem to us enough to overbear the evidence which the record did not preserve and which may have convinced the examiner.* These were (1) that the examiner did not believe all that Politzer had said; and (2) that the finding was 'irreconcilable with the other related facts and all the other evidence bearing on Politzer's behavior and attitude.' It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all. Nor can we find 'other related facts' which were 'irreconcilable' with believing that Politzer told Weintraub that Chairman was going to resign. Indeed, Chairman himself swore that on January 11, Politzer suggested to him that he resign, which affirmatively serves to confirm the examiner's finding that Politzer told Weintraub that Chairman would resign in order to placate him . . .

"There remains the question whether, with this explanation of Weintraub's delay missing, there was 'substantial evidence' that the cause of Chairman's discharge was his testimony; and on that the Board had the affirmative; so that it is not enough that Kende and Weintraub might have agreed to find a means of getting rid of Chairman, or that Kende unassisted might have been awaiting an opportunity. *Once more, if this was the finding of a judge, we should be in doubt whether it was sufficiently supported.* When

Weintraub went to Politzer on January 24, 1944, with his complaint at Chairman's continued presence in the factory, and when the two went to Kende because Politzer would not discharge Chairman, if Weintraub was acting in accordance with an agreement between Kende and himself, he was concealing the facts from Politzer. So too was Kende at the ensuing interview; indeed, we must assume that the two had arranged beforehand to keep Politzer in the dark, else Weintraub could scarcely have relied upon Kende to play his part. *This appears to us to be constructed substantially out of whole cloth, so improbable is it that they should have gone to such devious means to deceive Politzer.* On the other hand, although it is possible that Kende had been waiting for a proper occasion, independently of Weintraub, and that he seized upon Weintraub's complaint, being secretly actuated by his old grievance, we do not read the majority's decision as distinctly indicating that they meant so to find. But, if they did, unless we assume that Weintraub's complaint was trumped up *ad hoc*, to deceive Politzer, *it becomes the merest guess that Kende did not find it alone a sufficient reason for his action and reverted to his concealed spite.*" (emphasis supplied) (R.163-165)

From all of the above, it is clear that the Board engaged in practices which the amendments to the Act were designed to eliminate. Therefore, it is submitted that the Board's findings are not supported by substantial evidence on the record considered as a whole as required by the amended Act. Accordingly, the Court below erred in enforcing the Board's order.

IV.

The Board cannot extend the protection of the Act to a supervisor, who is not an "employee".

The Board's order is invalid for the reason that it requires reinstatement of a supervisor. The Board concedes that Chairman, who was discharged on January 24, 1944, was a supervisor. The Labor Management Relations Act of 1947 amended the definition of employee by excluding supervisors from the protection of the Act. Thus, Section 2(3) of the amended Act provides:

"the term 'employee' shall include any employee . . . but shall not include any individual employed . . . as a supervisor . . ."

The Board found that Chairman was discharged in violation of Section 8(4) of the National Labor Relations Act which appears in identical form in the amended Act as Section 8(a)(4), and provides:

"It shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an *employee* because he has filed charges or given testimony under this Act" (emphasis supplied).

Thus, protection is accorded only to an employee. Since supervisors were excluded from the definition of employee, Chairman, a supervisor, could no longer be accorded any of the benefits of the Act.

The Board, in its memorandum on the Petition for Certiorari, page 9, urged that the company's liability prior

to the amendment of the Act is preserved by the General Savings Statute, which provides:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." ³³

It is submitted that we are not concerned here with penalties or liabilities, but rather with public policy. The policy of including supervisors within the protection of the Act had been the subject of controversy for several years. The Board first held that supervisors were employees under the Act.³⁴ This doctrine was continued until the Board decision in *Matter of Maryland Dry Dock Company*³⁵ wherein the Board reversed its position and denied supervisory employees protection under the Act. Then, in 1945, the Board reversed its position again in *Matter of Packard Motor Car Company*³⁶ and returned to its original holding that supervisors were employees as defined by the Act. The rule of the *Packard* case was the law immediately preceding enactment of the Labor Management Relations Act.³⁷

³³ 1 U. S. C. 29.

³⁴ *Matter of Union Collieries Coal Company*, 41 NLRB 96.

³⁵ 49 NLRB 733.

³⁶ 61 NLRB 4.

³⁷ Congress was aware of the changing positions of the Board with respect to the status of supervisors under the old Act. A detailed summary of the Board decisions on this subject is set forth in the House Report. See "Legislative History of the Labor Management Relations Act, 1947" at 304.

The Board decisions granting supervisors protection under the Act were predicated upon a belief that such protection was essential to the fundamental policy of encouraging collective bargaining. Congress, in amending the Act, had a contrary view. After examining industrial experience under the Act, Congress made a policy judgment that unionization of supervisors served to undermine stable labor relations. Thus, the House Committee, initially reporting the Labor Management Relations Act, 1947, stated that:

"The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purpose of the Act to increase output of goods that move in the stream of commerce, and thus to increase its flow. It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, . . .

.

"What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its 'expertness', changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side or one whom, for *any* reason, he does not trust." ³⁸

It was for these reasons that Representative Hartley, one of the sponsors of the bill, stated as to supervisors " . . . this bill does not bar them from organizing, but they cannot obtain the benefits of the act." ³⁹

³⁸ Id. at 305, 308.

³⁹ Id. at 613.

In the court below the Board sought to rely upon the legislative history of the amended Act to sustain its position that the company's discharge of a supervisor constituted a continuing liability. It pointed to rejection in Conference of Section 102(c) of the House Bill, which provided that prior unfair labor practices could not be the basis of proceedings unless the conduct would continue to be an unfair labor practice under the amended Act. However, the instant case does not involve a change in concept of what is an unfair labor practice. Rather, it involves divesting completely an entire category of personnel of the protection previously enjoyed under the Act. Moreover, the principle of Section 102(c), was, in fact, continued in the amended statute. When Congress intended to preserve certain specific rights which had accrued prior to the amendment of the National Labor Relations Act, it did so with particularity and precise draftsmanship. Thus, Section 102 protects closed shop contracts then in existence. Similarly, Section 103 preserves limited rights under other types of collective bargaining agreements which had been entered into between the date of passage of the Act and the effective date. Section 302 preserves existing check-off agreements and certain rights under specifically defined welfare funds.

Therefore, in view of the Congressional policy determination, to exclude supervisors from the protection of the Act, the contention of the Board that the Savings Statute preserves liability is without merit. In *National Labor Relations Board v. Brozen*, 166 F. 2d 812 (C. A. 2), the court below denied enforcement of an order to bargain

with a union which had not complied with the provisions of the Act requiring filing of non-communist affidavits. The basis of this decision was a reluctance to enforce an order contrary to the policy of the amended Act. The decree of the court enforcing the Board order in the instant case is inconsistent with the ruling in the *Brozen* case. In both cases the petition for enforcement followed the Congressional enactment of certain policy changes. The Congressional intent should have been carried out here in the same manner as in the *Brozen* case.

The memorandum of the Board on the Petition for Certiorari attempts, at page 10, to distinguish the *Brozen* case because it dealt with an order regulating a future bargaining relationship. It is submitted that the true issue in the instant case, as in the *Brozen* decision, was not whether liabilities have been preserved but whether a change in public policy, as expressed in the amended Act, prevents subsequent enforcement of a Board order.

Moreover, insofar as the order of the Board requires reinstatement of Chairman, it may operate *in futuro*. This was recognized by the court below when it observed:

"It is no doubt unfortunate that upon restoration, any later discharge for subsequent cause will be apt to be interpreted as a covert reassertion of the old wrong; but that cannot be helped; it is a consequence of making motive the test of legal wrong" (R. 166).

Nor is the court's concern without foundation. The Board took the position below that "The discharge of a supervisor for having given testimony in a Board proceeding continues to be an unfair labor practice under the amended

Act.”⁴⁰ An examination of several recent decisions issued by the Board reveals an intention to nullify the Congressional intent by continuing to extend protection of the Act to supervisors. Thus, in *Matter of Cummer-Graham Co.*, 90 NLRB No. 114, the Board directed reinstatement with back pay of a supervisor who struck in sympathy with non-supervisory employees. The Board said:

“We agree with the Trial Examiner that Foreman Hayward Head is entitled to the same remedy as the other unfair labor practice strikers.”⁴¹

It would appear, therefore, that under the Board's theory in the instant case, anyone who testified in a Board proceeding is entitled to sweeping protection *in futuro*. Such a position is, of course, untenable. While it may be desirable that all witnesses in Board proceedings be accorded some form of protection, Congress did not adopt such a policy. The Act accords protection only to employees and supervisors are not employees. If a raw material supplier testified adversely to petitioner in a proceeding before

⁴⁰ Board Brief, Page 21. Insofar as the Board order herein may operate *in futuro*, the policy considerations are indistinguishable from the action taken by the Board in *National Labor Relations Board v. Wyandotte Transportation Co.*, 166 F. 2d 434 (C. A. 6) wherein the Board's order requiring the employer to bargain with a representative of certain supervisory employees was set aside with the Board's consent on the ground that the subsequent amendment of the Act relieved employers from the duty to bargain with supervisory employees. For a summary of other cases in which the Board took similar action in the Courts of Appeals with respect to orders that operated *in futuro*, see 13th Annual Report of the National Labor Relations Board, 1948, at 77-78.

⁴¹ 26 LRRM 1264, 1266. See also *Matter of New York Telephone Company*, 89 NLRB No. 85; *Matter of Inter-City Advertising Co.*, 89 NLRB No. 127.

the Board, petitioner might thereafter refuse to do business with him. The supplier would, of course, have been injured but he would have no recourse under the amended National Labor Relations Act. The supervisor stands in no better position.

Therefore, the reinstatement and back pay provisions are invalid as against public policy. The cease and desist provisions are equally invalid since they operate *in futuro*.

The order creates no private right. *Amalgamated Utility Workers v. Consolidated Edison Co. of N. Y.*, 309 U. S. 261, 267. For all of the above reasons, the provisions of the order in this case are invalid and the General Savings Statute is inapplicable. The fundamental public policy of the Act is to effectuate collective bargaining. The remedial provisions are merely incidental to its implementation. The statute is essentially remedial rather than punitive. *Republic Steel Corp. v. National Labor Relations Board*, 311 U. S. 7, 10. When the public policy changes, the incidental remedial order no longer has any foundation upon which it can rest. Accordingly, the order herein should not be enforced.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decree of the court below should be reversed.

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September, 1950.

APPENDIX

The relevant provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

• • •

3. The term "employee" shall include any employee, • • •

• • •

SEC. 4 (a) • • • The Board shall appoint, without regard for the provisions of the civil-service laws but subject to the Classification Act of 1923, as amended, an executive secretary, and such attorneys, examiners, and regional directors and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.

SEC. 8. It shall be an unfair labor practice for an employer—

• • •

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

SEC. 10 (c) • • • If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause

to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act . . .

(e) The Board shall have power to petition any circuit court of appeals of the United States . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. . . . The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240

of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

2. The relevant provisions of the Labor Management Relations Act of 1947, as amended (61 Stat. 136, 29 U. S. C. Supp. II, Secs. 141, *et seq.*) are as follows:

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

SEC. 2. When used in this Act—

• • •

(3) The term "employee" shall include any employee, * * * but shall not include any individual employed * * * as a supervisor, * * *.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

SEC. 4 (a) * * * The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed,

either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations.

SEC. 8. (a) It shall be an unfair labor practice for an employer—

• • •

- (4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

SEC. 10. (b) • • • Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

10 (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: • • • If upon the preponderance of the testimony taken the Board

shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize such recommended order shall become the order of the Board and become effective as therein prescribed.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia) or if all the circuit courts of appeals to which application may be made are in vacation any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings, and testimony upon which such order was entered.

and the findings and order of the Board. Upon such filing the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8(a)(3) and section 8(b)(2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior

to the date of the enactment of this Act, or (in the case of an agreement, for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8(3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

SEC. 103. No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the effective date of this title until one year after the date of such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

SEC. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such

employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families, and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such pay-

ments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the District where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c)(5)(B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by col-

lective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

* * *

3. The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*) are as follows:

SEC. 7. (c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. * * *

SEC. 8. (a). In cases in which the agency has not presided at the reception of the evidence, the officer who presided * * * shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial deci-

sion. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision . . .

SEC. 10 (e) Scope of review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 or 8 otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

SEC. 11. * * * there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings . . . who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they

are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended * * *.

4. The relevant provision of the General Savings Statute (61 Stat. 633, 1 U. S. C. 29) is as follows:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

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In the Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1950

UNIVERSAL CAMERA CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR
RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1949-1950

No. 723 40

UNIVERSAL CAMERA CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (D. 1-10)¹ is reported at 179 F. 2d 749. The findings of fact, conclusions of law and order of the Board are reported at 79 NLRB 379 (B. 1-25).

¹The record filed by petitioner with this Court is in four sections, designated, Part "A" (Petition for Enforcement); Part "B" (Appendix to the Board's brief below); Part "C" (Appendix to the Company's brief below); and Part "D" (proceedings in the court below). Record references are designated accordingly. Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's decision, succeeding references are to the supporting evidence.

JURISDICTION

The decision of the court below was rendered on January 10, 1950, and its decree enforcing the Board's order was entered on January 25, 1950 (D. 1-10, 11-13). The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the 1947 amendments to the National Labor Relations Act broadened the scope of court review of Board findings and orders.
2. Whether the fact that the Board has reversed findings of a Trial Examiner of itself detracts from the substantiality of the evidence which supports the Board's findings.
3. Whether the Board's findings are supported by substantial evidence on the record considered as a whole.
4. Whether the exclusion of supervisors from the definition of "employee" in the amended Act operates retroactively so as to preclude the Board from ordering the reinstatement with back pay of a supervisor who, prior to enactment of the amended act, was discriminatorily discharged for testifying in a Board proceeding.

STATUTES INVOLVED

The statutory provisions principally involved are the National Labor Relations Act of 1935 (49

Stat. 449, 29 U. S. C. 151, *et seq.*), Sections 2 (3), 8 (4) and 10 (a); the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. Supp. II, 141, *et seq.*), Sections 2 (3), 8 (a) (4), 10 (c) and (e); and the General Savings Statute (61 Stat. 633, 1 U. S. C., Supp. II, 109). These provisions are set forth in the Appendix, *infra*, pp. 12-16.

STATEMENT

Upon the usual proceedings under Section 10 of the National Labor Relations Act, the Board, on August 31, 1948, issued its findings of fact, conclusions of law and order (B. 1-25). Briefly summarized, the facts as found by the Board are as follows:

Imre Chairman was employed by petitioner in August, 1943, as an assistant engineer in charge of a crew of maintenance employees (B. 14; 30). These employees were then interested in having the Company recognize International Brotherhood of Electrical Workers, A.F.L., hereinafter called the Union, as their bargaining agent, and Chairman advised them how to proceed (B. 14; 31-32). The Union filed a petition for certification and a hearing thereon was scheduled by the Board for November 26, 1943. At the request of the employees, Chairman appeared at the hearing to testify in their behalf. (B. 14-15; 32-35). He did not testify on November 26, however, because the case was continued to November 30. The Company, which was opposed to the effort of the en-

gineers to obtain representation through the Union,² attempted to dissuade Chairman from testifying on that date. On several occasions after November 26, Chairman was warned by his immediate superior, Plant Engineer Politzer, not to appear at the hearing if he didn't "want to be in bad graces with the company" (B. 15; 33-34, 46). Chairman, nevertheless, did testify on November 30, and his testimony conflicted with that of Politzer, Chief Engineer Kende, and Vice-President Shapiro (B. 15; 34-35, 43-44, 70).

On the evening of November 30, immediately after the termination of the hearing, Kende accosted Chairman and angrily accused him of falsifying his testimony (B. 2, 15-16; 35, 48-54). The next day, Kende, resentful because Chairman had testified contrary to the Company's position, undertook to find some excuse for terminating his employment. Searching for a pretext which would warrant Chairman's discharge, he questioned Politzer as to Chairman's work, and discussed his employment application with Personnel Director Weintraub (R. 2, 16; 55-56, 68-71). However Kende failed at that time to discover a suitable pretext. He therefore instructed Politzer to investigate further and to observe Chairman's work very closely (B. 2-3, 16; 56, 72). A few days later Politzer warned Chairman that the Company

² See *Universal Camera Corporation*, 54 NLRB 1037, 1038, 1039.

officials "were after his scalp" and would try to find grounds to discharge him (B. 17; 36, 48, 77).

On December 30, Weintraub, the personnel manager, ordered Chairman to discharge one of the mechanics in his crew, and when Chairman refused, attempted to have Chairman removed from the plant by a militarized guard (B. 17-18; 38-39, 72-73). A serious argument followed, but it was finally settled when both men agreed to forget the incident (B. 18-19; 39, 51-53, 66-67). However, on January 24, 1944, Weintraub demanded that Politzer discharge Chairman. When Politzer refused to do so Weintraub went to Kende, who, over Politzer's objection, and without even calling Chairman to his office, or in any way investigating the matter, ordered that Chairman be fired (B. 3, 21; 57-59, 67-68, 74, 78).

Upon the foregoing facts the Board concluded that Kende had seized upon Weintraub's request as an excuse to discharge Chairman, and that Kende was actually motivated by his desire to eliminate Chairman from the plant because of Chairman's testimony at the Board hearing of November 30 (B. 3-5). In doing so the Board reversed the Trial Examiner, who had found that the discharge resulted from Weintraub's animosity toward Chairman because of the December 30 incident (B. 1-2, 23).

The Board ordered petitioner to cease and desist from discriminating against any employee be-

cause he had filed charges or given testimony under the Act, and to reinstate Chairman with back pay (B. 7-8).

Before the court below petitioner contended that the amendment to Section 10 (e) of the Act had broadened the scope of judicial review of Board findings; that, in any event, the fact that the Board had reversed the Trial Examiner was a factor detracting from the substantiality of the evidence supporting the Board's findings; and that the exclusion of supervisors from the definition of "employee" in the amended Act precluded the Board and the courts from remedying unfair labor practices committed under the Wagner Act and involving supervisory personnel. The court rejected each of these contentions, holding that the substantial evidence rule had not been changed; that the Board's reversal of the Trial Examiner did not affect the validity of the Board's findings; and that the amendment to Section 2(3) of the Act did not abate petitioner's liability for the discharge of Chairman, which occurred prior to the amendment and was preserved by the general savings statute (D. 1-10). The court decreed that the Board's order be enforced in full (D. 11-13). Judge Swan dissented (D. 10).

ARGUMENT

1. We believe that the court below was correct in holding that the substantial evidence rule was not broadened by Section 10(e) of the amended

Act. But since its holding in this respect conflicts with the decision of the Court of Appeals for the Sixth Circuit in *Pittsburgh Steamship Co. v. National Labor Relations Board*, decided February 17, 1950, not yet reported, petition for certiorari pending, No. 732, this Term, and presents a question of importance in the administration of the Act, we do not oppose the grant of certiorari to review this question.

2. Likewise, while we believe that the court correctly held that the Board's reversal of the Trial Examiner's findings does not, of itself, detract from the substantiality of the evidence which supports the Board's determinations, since this holding is in conflict with the cases cited on p. 13 of the Petition, we do not oppose the granting of certiorari on this point.

3. The question whether the Board's order is supported by substantial evidence on the record considered as a whole would seem to be interrelated with the questions as to the scope of review.

4. The facts of this case do not present the issue posed by petitioner's question number 4, "Whether the Board can extend the protection of the Act to a supervisor not an 'employee' as defined in the amended Act". The effect of the amended Act on the Board's authority to protect supervisors who testify in Board proceedings after its effective date is not here involved. When Chairman testified in November, 1943, he was an "employee" within the

meaning of the Act (*Packard Motor Car Company v. National Labor Relations Board*, 330 U. S. 485, 488), and was protected by it against discharge for testifying. Petitioner, when it discharged Chairman because he testified before the Board, violated Section 8 (4) of the Act, and then became liable to reinstate him with back pay.

The question presented, therefore, is whether Congress intended that the exclusion of supervisors from the definition of "employee" in Section 2(3) of the amended Act should have retroactive effect so as to remit liabilities for discriminatory discharges of supervisors which occurred prior to the effective date of the amendment. The amended Act and its legislative history clearly show that Congress did not so intend.

The amended Act contains no provision which prohibits the Board or the courts from remedying conduct which constituted an unfair labor practice under the original Act, where such conduct would not constitute an unfair labor practice under the amended Act. Section 102(c) of the House bill, which would have had the effect of prohibiting entry by the Board or enforcement by the courts of any order based on prior unfair labor practices unless the conduct continued to be an unfair labor practice under the amendments, was deliberately rejected in conference (see Section 102(c) of H.R. 3020, 80th Cong., 1st Sess.; Conf. Rep., H. Rep. No. 510, 80th Cong., 1st Sess., p. 61).

Accordingly, it has uniformly been held that the general savings statute, 1 U.S.C. 109, applies to liabilities which were incurred under the Wagner Act, and that for the purpose of enforcing such liabilities the original Act must "be treated as still remaining in force." *National Labor Relations Board v. National Garment Co.*, 166 F. 2d 233, 236-238 (C.A. 8), certiorari denied, 334 U. S. 845; *National Labor Relations Board v. Mylan-Sparta Co.*, 166 F. 2d 485, 488 (C.A. 6); *National Labor Relations Board v. Gate City Cotton Mills*, 167 F. 2d 647, 649 (C.A. 5); cf. *Lovely v. United States*, 175 F. 2d 312, 316 (C.A. 4).

This Court has twice denied certiorari to review the question whether the amendments preclude the Board and the courts from requiring an employer to reinstate with back pay supervisors who were discriminatorily discharged prior to the effective date of the amendments. *Budd Mfg. Co. v. National Labor Relations Board*, 332 U. S. 840, and *Vail Mfg. Co. v. National Labor Relations Board*, 334 U. S. 845. In the *Budd* case the Court granted certiorari with respect to the cease and desist provisions of the Board's order, and remanded the case to the Court of Appeals to consider the effect of the amended Act on those provisions, but denied certiorari with respect to the provisions requiring reinstatement of supervisors with back pay. The Court of Appeals for the Sixth Circuit construed this action as a holding that the general savings

statute is applicable to and preserves orders requiring reinstatement with back pay of supervisory employees discharged prior to the amendments. *Foreman's Ass'n of America v. Budd Mfg. Co.*, 169 F. 2d 571, 575, certiorari denied, 335 U. S. 908. In *Eastern Coal Corp. v. National Labor Relations Board*, 176 F. 2d 131, 137 (C.A. 4), where, as here, the Board's order was entered after the effective date of the Amended Act, the court concluded that the question here presented "has been decided by the Supreme Court in the case of *Budd Mfg. Co. v. National Labor Relations Board*, 332 U. S. 840, * * *." There are no contrary decisions.

Since the order here involved does not require the employer to observe for the future a relationship with his supervisory employees which the law no longer requires him to observe, the holding of the court below in *National Labor Relations Board v. Brozen*, 166 F. 2d 812, relied upon by petitioner, which dealt with an order regulating a future bargaining relationship, is not in point. See *Budd Mfg. Co. v. National Labor Relations Board*, 332 U. S. 840.³

³ Petitioner did not challenge below and does not now question the propriety of that provision of the Board's order which requires it to cease and desist from discharging or otherwise discriminating against any *employee* because he has filed charges or given testimony under the Act. Such conduct remains an unfair labor practice under the Act, as amended (Section 8(a)(4)).

CONCLUSION

For the reasons set forth above, we do not oppose the grant of a writ of certiorari limited to the first three questions presented. As to the remaining question the petition should be denied.

Respectfully submitted,

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HARVEY B. DIAMOND,
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National Labor Relations Board.

MAY 1950.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

(3) The term "employee" shall include any employee, * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce * * *.

2. The relevant provisions of the Labor Manage-

ment Relations Act of 1947 (61 Stat. 136, 29 U. S. C. Supp. II, 141, *et seq.*) are as follows:

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

“SEC. 2. When used in this Act—

* * * * *

“(3) The term ‘employee’ shall include any employee, * * * but shall not include any individual employed * * * as a supervisor, * * *

* * * * *

“(11) The term ‘supervisor’ means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

“SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * *

“SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.

"(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *.

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the

District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

“SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from

becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

* * * * *

3. The relevant provision of the General Savings Statute (61 Stat. 633, 1 U. S. C., Supp. II, 109) is as follows:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 40

UNIVERSAL CAMERA CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT*

**BRIEF FOR THE NATIONAL LABOR
RELATIONS BOARD**

OPINIONS BELOW

The opinion of the court below (R. 157-166)¹ is reported at 179 F. 2d 749. The findings of fact,

¹The record filed by petitioner with this Court, herein referred to as "R," is in four sections, designated Part "A" (Petition for Enforcement); Part "B" (Appendix to the Board's brief below); Part "C" (Appendix to the Company's brief below); and Part "D" (proceedings in the court below). Occasional references to the original transcript of testimony taken at the hearing before the Board, which was certified by the Board to the court below and lodged with the Clerk of this Court, are designated (Tr.). Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's decision; succeeding references are to the supporting evidence.

conclusions of law and order of the Board are reported at 79 NLRB 379 (R. 11-35).

JURISDICTION

The decision of the court below was rendered on January 10, 1950, and its decree enforcing the Board's order was entered on January 25, 1950 (R. 157, 167-169). The petition for a writ of certiorari was granted on May 29, 1950 (339 U. S. 962). The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the 1947 amendments to the National Labor Relations Act broadened the scope of court review of Board findings and orders.
2. Whether the fact that the Board has reversed findings of a trial examiner of itself detracts from the substantiality of the evidence which supports the Board's findings.
3. Whether the Board's findings are supported by substantial evidence on the record considered as a whole.
4. Whether the exclusion of supervisors from the definition of "employee" in the amended Act operates retroactively so as to preclude the Board from ordering the reinstatement with back pay of a supervisor who, prior to the enactment of the amended Act, was discriminatorily discharged for testifying in a Board proceeding.

STATUTES INVOLVED

The statutory provisions principally involved are the National Labor Relations Act of 1935 (49 Stat. 449, 29 U. S. C. 151, *et seq.*), Sections 2 (3), 8 (4) and 10 (e); the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), Sections 2 (3), 8 (a) (4), 10 (c) and (e); the Administrative Procedure Act (60 Stat. 237, 5 U. S. C., Sec. 1001, *et seq.*), Sections 5(c), 7 (b), 8, and 11; and the General Savings Statute (61 Stat. 635, 1 U. S. C. (Supp. III), § 109). These provisions are, in the main, set forth in the Appendix to petitioner's brief, pp. 54-65.

STATEMENT

Upon a charge duly filed by Imre Chairman, an individual, the Board on October 2, 1946, issued its complaint alleging that Universal Camera Corporation, herein called the Company or petitioner, had on or about January 25, 1944, discharged Chairman because he gave testimony under the Act (R. 21; 94-95). In its answer the Company denied the allegation and averred that Chairman had been discharged for "gross insubordination" (R. 21-22; Bd. Exh. 1G). A hearing upon the complaint was held before a trial examiner of the Board from October 28 through November 8, 1946 (R. 22). On February 18, 1947, the examiner issued his intermediate report recommending dismissal of the complaint (R. 21-35). On August 31, 1948, the Board issued its findings of fact,

conclusions of law and order, reversing the examiner's recommendation (R. 11-19). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:

I. THE BOARD'S FINDINGS OF FACT

A. *Events preceding the representation hearing of November 30, 1943*

In August, 1943, the Company employed Imre Chairman as an assistant engineer to supervise the maintenance mechanics on the 4 p.m. to midnight shift (R. 24; 40). For some time prior thereto the maintenance staff had engaged in organizational activities for the purpose of obtaining representation by Local No. 3, International Brotherhood of Electrical Workers, A.F.L., hereinafter called the Union (R. 24; 39-42, 80-81).² Chairman immediately interested himself in the organizational efforts of the maintenance employees;³ he attended Union meetings and assisted them in initiating the representation proceeding (R. 24, 31-32; 41-42).

The Union filed a petition with the Board for an election and certification of representatives and a

² The Company's production employees were represented by a C.I.O. union which had a contract with the Company. However, membership and representation had been denied by this union to the maintenance employees (R. 25; 53).

³ Chairman advised his immediate supervisor, Plant Engineer Politzer (R. 41) that the men had requested him to join the Union (Tr. 113). Politzer replied that "as an engineer if I were in your place I would not join" (*ibid.*). Chairman for this reason did not join and so advised the men (*ibid.*).

hearing was held, commencing November 26, 1943 (R. 24; 42).⁴ The contention of the petitioning Union, that the maintenance mechanics and certain associated non-production employees constituted an appropriate unit, was opposed by the Company and the CIO union (R. 25; 44-45, 53-54). The Company and the CIO union both sought dismissal of the petition, contending that the existing contract covered the employees in the proposed unit, and further, that the proposed unit was inappropriate (R. 25).

B. Chairman testifies at the representation proceeding and the Company seeks ground for his dismissal

Chairman, who had helped the maintenance employees prior to the representation proceeding, also attended the hearing at their request (R. 24; 42). He was present on November 26 but did not testify, the proceedings being adjourned to November 30, (R. 25; 42-43).⁵ After Chairman attended the November 26 session of the hearing, Plant Engineer Politzer, his immediate supervisor, repeatedly warned him that it would not do him "any good" to testify (R. 25; 41, 43). On November 27, the day following the first session of the hearing, Politzer advised Chairman not to testify at the

⁴ *Universal Camera Corporation*, 54 NLRB 1037.

⁵ While waiting to be called as a witness on the 26th Chairman sat with the petitioning employees and apart from the Company officials (R. 42).

coming session to be held on November 30 because "the Company heard [he] was down to testify and unless [he] want[ed] to be in bad graces with the Company [he] should not go down" (*ibid.*). The same day, to add further weight to his warning, Politzer instructed Harry Goldson, an engineer with status similar to that of Chairman, to caution Chairman against testifying (R. 25; 56). Pursuant to this instruction Goldson informed Chairman that he "should watch [his] step" because "they [the Company] know [he is] with the men" and if he testified at the hearing, "it would not help [him] with the company" (R. 25; 43-44, 56).

In spite of these warnings Chairman appeared at the November 30 session and, in support of the petitioning Union, took the stand both during the morning session and the early part of the afternoon, testifying at length (R. 25; 44, 91). The Company, opposing the petition, called Shapiro, its vice president, Kende, its chief engineer, and Politzer, all of whom gave testimony substantially different from Chairman's (R. 25; 44-45, 53-54, 65, 80).⁶

⁶ In its decision in the representation proceeding the Board in effect rejected the testimony of the Company officials and accepted that of Chairman and the employees as the more credible (54 NLRB 1037, 1038-1040). The Board directed an election among the employees in the proposed unit which resulted in the certification of the petitioning Union which thereafter entered into a contract with the Company (R. 24; 40).

The same day, after testifying, Chairman duly reported at the plant for work on his regular shift (R. 25; 40, 45). At about 7 p.m. that day, while leaving the plant for dinner, he met Chief Engineer Kende, who was entering the building (R. 25; 45, 64). Kende, indignant over Chairman's testimony, heatedly charged Chairman with having perjured himself at the hearing (R. 12, 25-26; 45, 58, 64). Chairman replied "if you call me a liar you are a liar" (*ibid.*).

Kende's animosity toward Chairman for testifying as he had was admittedly intense (R. 12-13; Tr. 532, 1010-1011).⁷ Although Kende had not heard Chairman testify (R. 26, n. 5; Tr. 1205-1206), he felt that the latter "was deliberately lying, not in one instance but in many instances, all afternoon" (R. 26; 65). In Kende's mind, after Chairman testified, "there was definite doubt regarding his suitability for a supervisory position of that nature. I intended to investigate that doubt, and if possible to get rid of that doubt" (*ibid.*). For the purpose of finding an excuse to discharge Chairman, Kende, the following morning, called Politzer and Personnel Manager Weintraub (R. 26; 75) to his office (R. 12, 26; 65-66, 78,

⁷ Counsel for the Company stated at the hearing that "There was a difference between the evidence of Mr. Kende and Mr. Chairman, and Mr. Kende was incensed about it" (Tr. 532). Politzer testified that "Kende was very angry with him [Chairman] for having to fight him" (Tr. 1010-1011).

81). Kende first inquired about Chairman's work. Despite Politzer's assurance that Chairman's work was satisfactory (R. 26; 65, 78, 81), Kende instructed Politzer to keep watch on him (R. 26; 66, Tr. 565-566). Kende then examined Chairman's employment application. Noting a personal reference from the editor of a foreign language newspaper, Kende inferred that Chairman must be a Communist (R. 26; 66, 78, 82). Kende was unwilling to act on this belief without further proof, however,⁸ and the conference adjourned. Following the conference Politzer undertook to investigate whether Chairman was a Communist, and he subsequently reported to Kende that Chairman was not a member of the Communist Party (R. 26-27; 82).⁹ As the Board found (R. 12-13), since neither ground for discharge was feasible, the Company did not discharge Chairman at that time.

After the conference, Politzer told Chairman that Kende was very angry and that he had better apologize, otherwise the Company officials would try to find some excuse to dismiss him (R. 27; 46, 58, 87). Chairman's credited version of Politzer's statements, which the latter admitted he may have made, reads (R. 27; 46-47, 87):

⁸ Kende testified (Tr. 566-567), "I realized that my belief that he was a Communist was still a belief."

⁹ As a result of this conference Weintraub also required Chairman to submit further evidence of his qualifications as an engineer (Tr. 1227-1229).

They are scanning my application, whether I did not make any statement, because Kende wants to have something criminal on me, and he says I am sub[versive] * * * on account of my going down to give testimony, they are after my scalp.

Politzer also told Goldson about the conference, adding that he thought the Company would find some way to discharge Chairman, and asked Goldson to warn him. Goldson did so (R. 27; 47, 56-57, 87, 88).¹⁰

C. The altercation between Weintraub and Chairman on December 30, 1943

On the night of December 30, 1943, Chairman stationed Kollisch, a maintenance mechanic, at the mechanics' shop for emergency call (R. 27; 37, 47). The plant was engaged in war production at the time, and Personnel Manager Weintraub, patrolling the various departments to make sure that there was no slackening of work because of the approaching New Year's holiday, came upon Kollisch seemingly loafing (R. 27; 75-76, 37). Weintraub brought Kollisch to Chairman and demanded that Chairman "Fire him. Send him home" (R. 27-28; 38-39, 48, 76). Chairman ex-

¹⁰ Goldson further suggested to Chairman that if there was anything in his record which could not bear scrutiny he should resign because "Kende has all the reports in, and your application blank, and they want to see if they can get rid of you" (R. 47, 57-58). Chairman, however, refused to apologize or to resign (R. 58).

plained that he had directed Kollisch to stand by for emergency duty, but Weintraub insisted (R. 28; 39, 48). Chairman then told Weintraub that he needed the services of Kollisch that night, and that since his orders came from Politzer, the matter could be taken up with Politzer the next day and Kollisch discharged if necessary (R. 38; 48, 60). Weintraub retorted, "I am the boss," "I have such powers from the War Department that if I want to" "I can slap a man," "I can kill a man if I want to" (R. 28; 48, 60). Chairman answered, "If you are drunk, please go home and sleep it off" (*ibid.*). Weintraub then ordered Chairman to leave the plant, but Chairman would not do so (R. 28; 48, 76, 60). Unable to reach a guard by telephone, Weintraub rushed out of the office, returning with a uniformed guard (R. 28; 76, 48-49, 60-61). Zicarelli, shop steward for the Union representing the maintenance mechanics, intervened (R. 28; 49, 59, 61, 76-77). Remonstrating with Chairman and Weintraub, he got both men to agree to shake hands and forget the incident (R. 28; 49, 76-77, 61-63). Weintraub and the guard then left and Chairman finished his shift without further incident (R. 28-29; 49, 62-63, 64).

D. The discharge of Chairman

Chairman reported to work as usual the next day (R. 13-14, 29; 50, 79, 82). He told Politzer of the occurrence of the night before, including a

statement that Weintraub had been drunk, and asked whether Weintraub had authority to give him orders (R. 29; 50, 82, 83). Politzer did not reprimand or discipline Chairman but assured him, instead, that Weintraub was not his boss and that Weintraub had acted "out of order" in seeking to assert authority over Chairman (R. 13, 29; 50-51, 83, 87). Politzer added that he would see to it that Weintraub kept his promise to forget the matter (R. 29; 50). On the same day, Zicarelli, who had mediated between Weintraub and Chairman the night before, spoke to Weintraub and got his assurance that the incident was "forgotten" (R. 14; 63). Chairman continued regularly at work (R. 13-14, 31; 79).

About January 11 or 12, 1944, Politzer reported to Chairman that "Weintraub is acting funny, * * * he wants to bring up this question again," and asked Chairman whether he would consider resigning (R. 31; 51). Chairman refused, saying, "I know that they want to do something because I helped the men and testified for them, that then, I never quit under fire and I will see it through to the end" (*ibid.*).

About two weeks later, on January 24, Weintraub told Politzer he wanted Chairman out of the plant (R. 31; 77, 84, 88). Politzer challenged Weintraub's authority to order the dismissal and the two sought out Politzer's superior, Kende,

telling him of their disagreement and the circumstances which had given rise to it (R. 31; 77-78, 84).

Politzer voiced his opposition to the discharge, but Kende did not question Chairman himself or in any manner investigate the incident (R. 13, 31; 67-69, 77-78, 84-85). He summarily told Politzer to abide by Weintraub's decision (*ibid.*). Politzer thereupon filled out a slip terminating Chairman's employment as of the next day, January 25, for "misconduct" (R. 31; 78, 85, 99-100).

On the following day, January 25, Chairman was stopped by a guard when about to enter the plant and was sent to Weintraub's office (R. 31; 51). Weintraub told Chairman that he had been discharged for misconduct and had a guard escort him to Politzer's office to get his personal possessions (R. 31; 52, 88-89). There, Politzer assured Chairman that he had been satisfied with his work and had not wanted to discharge him (R. 31; 52, 89). On January 28, 1944, a charge was filed with the Board at Chairman's behest alleging that his discharge violated Section 8 (1) and (4) of the Act (R. 23; 153-154, cf. Tr. 304, 323).

II. THE BOARD'S CONCLUSIONS OF LAW

The Board, one member dissenting (R. 18-19), found that in violation of Section 8 (4) of the original National Labor Relations Act, which forbade an employer "to discharge or otherwise discriminate against an employee because he has filed

charges or given testimony under this Act," the Company discharged Chairman because of the adverse testimony he gave at the Board representation hearing (R. 14-15). After a full analysis of the evidence (R. 11-15), the Board concluded that Weintraub's quarrel with Chairman on December 30, 1943, was a pretext utilized as a basis for dismissal, and that the real reason for Chairman's discharge was the Company's "extreme animus against Chairman because of his testimony at the Board hearing . . ." (R. 14). In reaching this conclusion, the Board rejected the examiner's contrary evaluation of the evidence.

In the interim between Chairman's discharge and the Board's order, Section 2 (3) of the Act was amended to exclude from the term "employee," any "individual employed as a supervisor." The Board unanimously held, in reliance upon the general saving statute which prevents the extinguishment of a liability incurred under a repealed statute unless the repealing act expressly provides for it,¹¹ that the Company's liability to return Chairman to his job and to make him whole for intervening wage losses was not released (R. 16).

III. THE BOARD'S ORDER

The order of the Board (R. 17-18) requires the Company to cease and desist from discriminating

¹¹ 61 Stat. 635, 1 U. S. C. (Supp. III), § 109, see *infra*, p. 113.

against any employee for filing charges or giving testimony under the Act or in any other manner interfering with the right of employees to file and prosecute charges and to give testimony under the Act; to reinstate Chairman with back pay;¹² and to post notices.

IV. PROCEEDINGS IN THE COURT BELOW

On June 29, 1949, the Board filed in the court below a petition to enforce the Board's order (R. 1-7). On January 10, 1950, the court below rendered its opinion (R. 157-166), and on January 25, 1950, entered its decree enforcing the Board's order in full (R. 167-168).

The court below held, (1) that the amendment to Section 10 (e) of the National Labor Relations Act, changing the language from, "The findings of the Board as to the facts, if supported by evidence, shall be conclusive," to, "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive," did not enlarge the scope of judicial review (R. 160-161), for "no more was done than to make definite what was already implied" (R. 161); (2) that the

¹² The Board, pursuant to its customary practice, imposed no back pay obligation for the nineteen month period intervening between the date of the intermediate report recommending dismissal of the complaint and the date of the Board's order (R. 16).

Board's rejection of the examiner's recommended findings of fact, and the Board's substitution of its own findings based on its independent evaluation of the evidence, were without relevance in determining on judicial review whether substantial evidence supports the facts as found by the Board (R. 161-163); (3) Judge Swan dissenting (R. 166), that the Board's finding that Chairman was discharged because of the testimony he gave was "within the bounds of rational entertainment" (R. 165); and (4) that the intervening repeal of the protection extended to supervisors "did not extinguish the [Company's] 'liability' . . . to make restitution for the wrong—the discharge," and that "comprised the restoration of Chairman to his position as 'supervisory engineer,' and the payment of any loss he may have suffered meanwhile" (R. 165).

SUMMARY OF ARGUMENT

I. The change in the language used to define the standard of judicial review of Board findings of fact did not enlarge its scope, for no more was done than to make definite what was already implied. See Brief for Petitioner in No. 42, *National Labor Relations Board v. Pittsburgh S.S. Co.*, pp. 47-92.

II. A. By statute the function of finding the facts is a responsibility committed to the Board's independent determination. Accordingly, when complaint is made that the Board "did not adopt the recommendations of its examiner," the short an-

swer is that the Board "had the responsibility of decision and was not only at liberty but was required to reach its own conclusions upon the evidence." *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285-286.

The great weight of authority in the courts of appeals supports the Government's position that an examiner's findings are recommendatory only; that they do not bind the Board; and that the Board's reversal of an examiner's findings neither alters the scope of judicial review nor detracts from the evidence supporting the Board's substituted findings. In this respect the role of the examiner vis-a-vis the Board is entirely different from the role of a trial court vis-a-vis an appellate court, or the role of a master vis-a-vis a trial court.

B. The function of the examiner is to serve as a conduit through which the facts are funnelled to the Board for its independent determination. Under the examiner's guidance, within the limits of the issues framed by the pleadings, a record is made in an adversary proceeding by which the contestants present their case. The examiner marshals and tentatively resolves the factual and legal issues involved, and his report presents the Board with the first disinterested analysis of the raw material of the record. With the examiner's report as their guidepost, the contestants by their exceptions urge the deficiencies of his recommended disposition, and thereby the issues for the Board's

determination are ordinarily brought into sharp focus. The examiner's function is intelligently to assemble the facts for the Board's independent adjudication. The fulfillment of this function of the examiner does not require that his recommendation, if rejected by the Board, should detract from the finality to be accorded Board findings.

C. The only aspect of administrative fact-finding which accords even surface plausibility to the argument that on judicial review weight should be attached to an examiner's recommendations which the Board has not adopted flows from the fact that the examiner but not the Board is in a position to evaluate demeanor evidence. But this advantage which the examiner possesses does ~~not detract~~ from the responsibility and power of the Board to base its findings as to credibility upon its view of the preponderance of the evidence. Neither when the Board accepts nor when it rejects recommendations of an examiner as to credibility does the propriety of its concurrence or disagreement with the examiner, as such, become the subject of judicial review. The question in all cases is whether the Board's own findings as to credibility are supported by substantial evidence. Where the Board has affirmed an examiner's credibility findings the examiner's evaluation of demeanor evidence supports the Board's resolution; where the Board has not relied upon the examiner's evaluation of demeanor, demeanor evidence plays no part on judicial review

of the Board's findings. The examiner's evaluation of demeanor may not be relied on in judicial review as a factor weighing against the Board's resolution. In such cases the rationality of the Board's finding must be determined from the bare record as though there had been no examiner's report.

Three considerations require this conclusion.

(1) The value of demeanor evidence depends on the competence of the observer, and in judging the worth of an evaluation of demeanor, the Board rightly takes into account the varying ability of its examiners. On judicial review, this factor—the ability of the examiner—is not known to the court, and in the absence of relevant information as to this matter, intelligent review of the Board's disposition cannot take place, for review cannot be exercised in the absence of pertinent data. (2) Demeanor evidence is but one factor in the determination of credibility, and credibility is but one facet in the process of fact-finding. Every element in the fact equation—inference, weight, credibility, and so forth—interact with each other to influence the final fact determination, and a change in the emphasis on one item affects the significance of another and requires a re-ordering of the whole, including the evaluation of demeanor evidence. Moreover, the Board may regard the objective evidence bearing on credibility as itself outweighing the demeanor evidence on which the examiner may

have relied. As a result, in exercising its fact-finding function after receipt of the examiner's report, the Board is necessarily required to consider anew the influence to be allotted demeanor evidence in the light of its own independent and perhaps different appraisal of other evidence. This aspect of the Board's decisional process is not open to judicial inquiry. The court cannot, consistent with the substantial evidence rule, independently evaluate the significance of the competing evidence, in the light of which the Board discounted the demeanor evidence, for the court may not substitute its judgment for the Board's. Nor can the court inquire whether a rational fact-finder could have assessed the demeanor evidence differently if he had also evaluated differently the competing evidence. (3) Intelligent fact-finding, and in consequence intelligent judicial review, can exist without the aid of demeanor evidence. Judicial review loses none of its corrective value in excluding from its purview the question whether the Board properly discounted the examiner's recommendation insofar as it rested upon observation and inferences from the witness' demeanor. Accordingly, "Even on a question of the credibility of contradictory witnesses, notwithstanding the advantage the examiner has of seeing and hearing them testify, the Board may differ from the conclusion of its examiner," for the "Board is in no case bound to follow the fact-findings or recommendations of an examiner." *National Labor*

Relations Board v. Tex-O-Kan Flour Mills Co., 122 F. 2d 433, 437 (C.A.5).

D. The Administrative Procedure Act preserves the advisory character of the examiner's findings. The enhanced status which the APA imparts to the examiner does not imply any element of finality to his fact determinations, for though his findings are only advisory, the significant role he plays at the hearing meets the APA's purpose of endowing his position with independence, dignity, and responsibility. In fulfilling his function, the examiner does not in any way bind the agency to his findings. Whether the examiner makes an initial decision or recommends a decision, and either course may be adopted by the agency as it chooses, Section 8 (a) of the APA empowers the agency to exercise complete revisory authority over his findings. If the examiner only recommends a decision, plainly the agency retains full fact-finding power, for the very concept of a recommendation negatives compulsion or finality. If the examiner makes an initial decision, Section 8 (a) of the APA clearly states that on "appeal from or review of the initial decisions of such officers *the agency shall . . . have all the powers which it would have in making the initial decision*" (emphasis supplied). In either case, therefore, the APA confirms the agency's complete freedom of decision.

E. Not only does the relationship of the agency to the examiner compel the conclusion that no finality

inheres in his findings, but the relationship of agency to court requires the same conclusion. (1) The objective in reposing the fact-finding function in the Board is to secure its experienced and unified judgment in the specialized field committed to its determination. For this reason, on judicial review, findings of fact are "conclusive" unless irrational. But, division between the Board and its examiner does not suggest that the Board's view is irrational, for contrariety of opinion does not imply unreasonableness. (2) As the court below stated, the ascription of some detractive weight to the Board's reversal of its examiner is too impalpable a standard to be applied on judicial review, and it also invites, by its very vagueness, a substitution of judicial for administrative judgment. Furthermore, it would create two standards of review, one to be applied to the concurrent findings of Board and examiner and a more rigorous one to be applied where division exists, although the statute provides for only a single standard.

III. Substantial evidence on the record considered as a whole supports the Board's finding that Chairman was discharged because he gave testimony at a Board hearing. The subsidiary elements of this finding are: (1) By testifying at a Board representation hearing on November 30, 1943, in opposition to the stand taken by petitioner, Chairman aroused the strong animosity of Chief Engineer Kende, who desired to discharge him because

of the adverse evidence he gave; (2) Kende promptly investigated Chairman's employment history, in an effort to unearth a basis for discharge; because he could not find support for the immediate reasons which suggested themselves, inefficiency and Communist affiliation, he did not then dismiss Chairman, but his desire and intention to uncover a pretext warranting discharge continued unabated; (3) on January 24, 1944, eight weeks later, Kende summarily discharged Chairman, utilizing as his pretext an incident of asserted insubordination which had occurred three and one-half weeks before on December 30, 1943. In this view of the facts the discharge violated Section 8 (1) and (4) of the Act whether or not in belatedly bringing the incident to Kende's attention Weintraub was motivated in part or in whole by his knowledge of Kende's desire to find some pretext which would enable him to dismiss Chairman. The crucial question is whether Kende's animus against Chairman because of his testimony played a part in Kende's decision to discharge him. The Board's conclusion that it did, as the court below held, is a rational appraisal of the evidence.

IV. Despite the intervening repeal of the statutory protection extended to supervisors, the obligation to grant reinstatement and back pay to a supervisor wrongfully discharged because he gave testimony is a "liability" preserved from extinguishment by the general saving statute. The

employer is under a responsibility to observe the statutory command while it is still in effect, and his answerability for failure to do so is a "liability incurred." It is no less a "liability" because of the public character of an award of reinstatement with back pay, for sanctions rooted in the public interest are embraced within the sweep of the term.

The general saving statute is to be "treated as if incorporated in and as a part of subsequent enactments," and it "must be enforced unless either by express declaration or necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect" to it. *Great Northern Ry. Co. v. United States*, 208 U.S. 452, 465. There is no "express declaration" remitting the obligation to reinstate with back pay a wrongfully-discharged supervisor; on the contrary, Congress rejected a proposal which would have released this obligation. Nor is any remission of a liability to redress a past wrong to be implied from the present policy of the amendments which denies future protection to supervisors. To infer from the future immunity of an employer the release of a liability incurred in the past "is to take too narrow a view of the public policy involved," for current vulnerability for present acts "is no reason why the supervisors who have been wrongfully discharged should not be restored to their positions with reimbursement of their loss." *Eastern Coal Corp. v. National Labor*

Relations Board, 176 F. 2d 131, 136-137 (C.A. 4). Furthermore, the general saving statute itself expresses an affirmative and existing policy to protect persons who act in reliance upon the succor of the law as it stands and to prevent rewarding wrongdoers who fail to observe prevailing standards.

ARGUMENT

I. THE 1947 AMENDMENTS TO THE NATIONAL LABOR RELATIONS ACT DID NOT BROADEN THE SCOPE OF COURT REVIEW OF BOARD FINDINGS OF FACT

As the court below explained, the change in the language used to define the standard of judicial review of Board findings of fact did not enlarge its scope, for "no more was done than to make definite what was already implied" (R. 161). Our position on this question is fully stated in our brief before this Court in *National Labor Relations Board v. Pittsburgh Steamship Co.*, No. 42, this Term, pp. 47-92, to which the Court is referred.

II. AN EXAMINER'S FINDINGS ARE ADVISORY ONLY, AND IN THE EXERCISE OF ITS AUTHORITY TO FIND FACTS, THE BOARD MAY REVERSE THE EXAMINER'S FINDINGS WITHOUT THEREBY DETRACTING FROM THE SUBSTANTIALITY OF THE BOARD'S SUBSTITUTED FINDINGS

In the instant case the Board rejected certain factual conclusions recommended by the examiner for the reason that, in the Board's view, contrary

conclusions were more reasonable and more consistent with the record as a whole. The court below held that, although in its view, the findings recommended by the examiner were not clearly erroneous, the Board could reasonably have reached the conclusions that it did, and that its findings were therefore supported by substantial evidence. The court further held that without ascribing to the examiner's report a finality similar to that ascribed to a master's report by Rule 53 (e) (2) of the Federal Rules of Civil Procedure, it could not regard the Board's rejection of the examiner's recommendations as "a factor in the court's own decision."

It is the Government's position that in so holding the court below properly applied the substantial evidence rule. The rule rests upon the premise that the function of initial fact finding was committed by Congress to the independent judgment of the Board, and that findings recommended by an examiner, unlike those of a master, are advisory only. The rule further contemplates that while the Board shall base its findings upon the "preponderance" of the evidence (Section 10 (c) of the Act), the Board's findings shall be sustained on judicial review unless shown to be unreasonable. This means that Board findings shown to be reasonable on the record considered as a whole may not be upset even though the reviewing court may believe that contrary findings would be equally, or even more reasonable. *National Labor Relations Board v. Ne-*

vada Consolidated Copper Corp., 316 U. S. 105; *National Labor Relations Board v. Waterman Steamship Corp.*, 309 U. S. 206. Review of Board findings under this rule, we submit, is not affected by the fact that an examiner had recommended a contrary finding. To give weight to this factor would, *pro tanto*, ascribe to the examiner's findings a finality incompatible with the advisory character of his report, deprive the Board of power to base findings upon its view of the preponderance of the evidence, and involve the judiciary in reweighing of the evidence, a task incompatible with the limitations of the substantial evidence rule.

In addition to the decision of the court below,¹³ this position has been sustained in full by the decisions of the Courts of Appeals for the Third,¹⁴ Fifth,¹⁵ Eighth,¹⁶ and Ninth¹⁷ Circuits. With ref-

¹³ See also, *National Labor Relations Board v. Air Associates*, 121 F. 2d 586 (C.A. 2); *National Labor Relations Board v. Hamel Leather Co.*, 135 F. 2d 71 (C.A. 1).

¹⁴ *National Labor Relations Board v. Elkland Leather Co.*, 114 F. 2d 221, 225 (C.A. 3), certiorari denied, 311 U.S. 705; *Burk Bros. v. National Labor Relations Board*, 117 F. 2d 686, 688 (C.A. 3), certiorari denied, 313 U.S. 588; *National Labor Relations Board v. Botany Worsted Mills*, 133 F. 2d 876, 882-883 (C.A. 3), certiorari denied, 319 U.S. 751; *National Labor Relations Board v. Blatt Co.*, 143 F. 2d 268, 272, n. 11 (C.A. 3), certiorari denied, 323 U.S. 774; see also *National Labor Relations Board v. Weirton Steel Co.*, 135 F. 2d 494, 496, n. 4 (C.A. 3); *Berkshire Knitting Mills v. National Labor Relations Board*, 139 F. 2d 134, 137 (C.A. 3), certiorari denied, 322 U.S. 747.

¹⁵ *National Labor Relations Board v. Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, 437 (C.A. 5); *Continental Box Co.*

erence to other administrative agencies, the same view has in substance been taken by this Court in relation to the Federal Radio Commission;¹⁸ by the Fourth Circuit in relation to the Federal Trade Commission;¹⁹ and by three-judge courts in relation to the Interstate Commerce Commission.²⁰ And it is likewise the opinion of administrative agencies.²¹

v. National Labor Relations Board, 113 F. 2d 93, 97 (C.A. 5); *National Labor Relations Board v. Brown Paper Mill Co.*, 133 F. 2d 988, 990 (C.A. 5).

¹⁶ *National Labor Relations Board v. Laister-Kauffman Aircraft Corp.*, 144 F. 2d 9, 16-17 (C.A. 8).

¹⁷ *National Labor Relations Board v. Security Warehouse & Cold Storage Co.*, 136 F. 2d 829, 830-831, 834 (C.A. 9). See also *National Labor Relations Board v. Oregon Worsted Co.*, 94 F. 2d 671 (C.A. 9).

¹⁸ *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 285-286; cf., *Smith v. Bowles*, 142 F. 2d 63 (E.C.A.); *Ladner v. Bowles*, 142 F. 2d 566, 567-568 (E.C.A.); *Direct Realty Co. v. Porter*, 157 F. 2d 434, 438 (E.C.A.). The Emergency Court of Appeals repeatedly stressed that the responsibility of finding facts was vested in the Price Administrator and he could not delegate performance of the function to a subordinate official.

¹⁹ *Bond Crown & Cork Co. v. Federal Trade Commission*, 176 F. 2d 974, 979-980 (C.A. 4). See also, *Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission*, 63 F. 2d 108 (C.A. 2).

²⁰ *Beard Laney, Inc. v. United States*, 83 F. Supp. 27, 33 (E. D. S. C.), affirmed, 338 U.S. 803; *Lang Transport Corp. v. United States*, 75 F. Supp. 915, 925 (S. D. Cal.); *Watson Brothers Transport Co. v. United States*, 59 F. Supp. 762, 776 (D. Neb.).

²¹ *United States v. California*, 55 I. D. 532, 540-546 (Secretary of the Interior); *White*, 1 S. E. C. 574, 576-577; *Kinner*

Petitioner asserts, however, that on judicial review of the Board's findings of fact, "a reviewing court must, as a matter of law, give weight to the reversal of an examiner in assessing the substantiality of the Board's findings," and that the absence of concurrence between the Board and the trial examiner derogates from the substantiality of the evidence supporting the Board's conclusion (Br., p. 35). To support its contention, petitioner relies upon the decision of the Court of Appeals for the Seventh Circuit in *Staley Mfg. Co. v. National Labor Relations Board*,²² and the few subsequent

Airplane and Motor Corp., 2 S. E. C. 943, 945; *Wright*, 3 S. E. C. 190, 213; Att'y. Gen. Comm. Ad. Proc., SEC, Sen. Doc. No. 10, Part 13, 77th Cong., 1st Sess., 87-88 and n. 177 (The Securities and Exchange Commission "has persistently been at pains to point out" that "the trial examiner's report is advisory only and in no way binding upon the Commission"; that "the record in each case is reexamined meticulously"; and examiner's findings involving "conflicts of factual testimony and credibility" have been reversed.); Att'y. Gen. Comm. Ad. Proc., United States Maritime Comm., Sen. Doc. No. 186, Part 4, 76th Cong., 3d Sess., 14 (As to the Maritime Commission "in no case does the trial examiner determine the final result; and, of course, there is no question concerning the power of the Commission, which did not see and hear the witnesses, to make a valid decision based upon its consideration of the 'cold record.'").

²² 117 F. 2d 868, 878 (C.A. 7), criticized in, Note, 54 Harv. L. Rev. 687 (1941); 1 Pike & Fischer Ad. Law (Current Text) § 63a. 16-5 to 7. The Seventh Circuit has adhered to the rule of the *Staley* case in *Kidder Oil Co. v. Federal Trade Commission*, 117 F. 2d 892, 895, 899 (C.A. 7); *Wyman-Gordon Co. v. National Labor Relations Board*, 153 F. 2d 480, 483 (C.A. 7). In neither case was the reasoning of the *Staley* opinion elaborated upon. The Seventh Circuit distinguished

cases which have indicated concurrence with that view.²³ In *Staley*, no variance existed between the Board and the examiner as to the basic facts, but, overruling the examiner's finding, the Board found as an ultimate conclusion of fact that a labor organization was company-dominated. In this context, the Seventh Circuit held that (117 F. 2d, at 878):

... while the report of the Examiner is not binding on the Board, yet where it reaches a conclusion opposite to that of the Examiner, ... the report of the latter has a bearing on the question of substantial support and materially detracts therefrom.

In essence, the *Staley* view endows the findings of an examiner with an indefinite element of

Staley in *National Labor Relations Board v. Superior Tanning Co.*, 117 F. 2d 881, 889-890 (C.A. 7), certiorari denied, 313 U.S. 559.

²³ The Sixth Circuit in a single case, *National Labor Relations Board v. Ohio Calcium Co.*, 133 F. 2d 721, 724 (C.A. 6), indicated that where there was both difference of opinion among the Board members and reversal of the trial examiner, doubt might be cast upon the basic findings of fact. But contrast the statement of the court in *Consumers Power Co. v. National Labor Relations Board*, 113 F. 2d 38, 43 (C.A. 6): "The report of the examiner is merely a recommendation subject to review by the Board, and it is the Board's findings and order that are ... in issue, and not the examiner's recommendation. If the findings are supported by substantial evidence and sustain the order it becomes our duty to direct enforcement." The Eighth Circuit in *Wilson & Co. v. National Labor Relations Board*, 123 F. 2d 411, 418 (C.A. 8), first took the *Staley* view but thereafter in *National Labor Relations Board v. Laister-Kauffmann Aircraft Corp.*, 144 F. 2d 9, 16-17 (C.A. 8), unequivocally repudiated it.

finality. Such finality attaches, not merely to the determination of subsidiary issues of fact, but also to ultimate conclusions of fact. Under the *Staley* rule a bifurcated standard of review would exist, depending upon the posture of the Board's decision in relation to the examiner's report. If the findings of the Board and the examiner concur, the inquiry of the reviewing court ends when it is satisfied that substantial evidence exists to support the concurrent-determination. If, on the other hand, the findings of the Board and the examiner differ, the quantum of proof which would otherwise meet the requirement of substantial evidence must be augmented, and this increase is necessary in order to justify the Board's disturbance of the examiner's finding. To whatever extent the Board must justify its reversal of the examiner under that rule, the focus on review shifts from the Board's findings to those of the examiner. And, if the Board could justify its reversal of the examiner's findings short of showing them to have been "clearly erroneous," it could do so only by demonstrating to the satisfaction of the court that the preponderance of the evidence was against the examiner's finding. Judicial inquiry then, would be directed not to whether the Board's finding is supported by substantial evidence, but rather, to whether the Board's finding is supported by a preponderance of the evidence. This would involve nothing less than reweighing the evidence *de novo*. See Brief

for the National Labor Relations Board in *National Labor Relations Board v. Pittsburgh Steamship Co.*, No. 42, this Term, pp. 76-78.

Contrary to petitioner's contention, nothing in the National Labor Relations Act, either before or after amendment, the Administrative Procedure Act (A.P.A.), or the legislative history of those statutes indicates that Congress contemplated a result which so distorts the relationship of the Board to its examiners and of the Board to the reviewing court. More particularly, the amendments to the NLRA are even more explicit than the original enactment in requiring that *the Board* find the facts in accordance with *its independent judgment* of the record. The function of the examiner continues to be, as it always has been, intelligently to assemble the facts and to provide all parties a full opportunity to present facts and argument for the Board's ultimate determination. The enhanced status which the APA gives the examiner is designed to improve the quality of the performance of this function, and not, as petitioner contends (Br., pp. 27-28, 34), to impart any element of finality to his recommendations (*infra*, pp. 67-69). The requirement that the examiner issue a report is part of the intelligent performance of his intermediate, advisory role, and not, as petitioner contends (Br., p. 29), to bind the Board to the recommended findings embodied in it (*infra*, pp. 69-76). Furthermore, the petitioner

overlooks the fact that the examiner's report was initially made mandatory by the APA, and the APA is explicit that the examiner's report shall not bind the agency (*infra*, pp. 64-65, 71-79). The amendments to the NLRA merely carried over this existing requirement without change in its purpose.

We turn now to a particularized consideration of the issue thus raised.

A. THE BOARD IS THE FINDER OF FACT

In the process leading to formal adjudication of unfair labor practice cases, the complaint may be issued by a subordinate official (NLRA, Sec. 10 (b)), the hearing may be conducted by an examiner (NLRA, Sec. 10 (b)), and in that event the latter is required to render a "proposed report" after the close of the hearing (NLRA, Sec. 10 (c)). In sharp contrast to the express delegability of these functions, the power of final fact-finding is withheld from subordinate officials and committed exclusively to the Board. Section 10 (c) of the National Labor Relations Act unequivocally commands that:

If upon the preponderance of the testimony taken *the Board* shall be of the opinion that any person named in the complaint has engaged in . . . any . . . unfair labor practice, then *the Board* shall state its findings of fact and shall issue [an appropriate order].

And in like fashion it states that:

If upon the preponderance of the testimony taken *the Board* shall not be of the opinion that the person named in the complaint has engaged in . . . any . . . unfair labor practice, then *the Board* shall state its findings of fact and shall issue an order dismissing the . . . complaint. [All italics are supplied.]

It is thus the Board's "opinion" upon the "preponderance of the testimony" which is required, and it is the Board which "shall state its findings of fact." This emphasis upon obtaining the Board's personal, independent judgment of the facts is stressed in Section 4 (a) of the Act:

The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations.

This provision, which was added by the amended Act, does not, as petitioner contends (Br., pp.

30-31), imply any change in the examiner's advisory role. On the contrary, the requirement that the examiner shall not consult with the Board emphasizes the insistence upon the Board members' personal judgment of the facts (see S. Rep. No. 105, 80th Cong., 1st Sess., 10). And the requirement that the examiner's report shall not be reviewed by anyone other than the Board, apart from its plain stress upon the Board's independent adjudicatory function, means only that while performing his intermediate role, the examiner like the individual Board members shall make up his own mind and shall be uninfluenced in the discharge of his responsibility "by the supervisory employees in the Trial Examining Division." S. Rep. No. 105, 80th Cong., 1st Sess., 9.

Statutory finality attaches to an examiner's report only "if no exceptions are filed" to it within a prescribed time, and in that event, his "recommended order shall become the order of the Board and become effective as therein prescribed" (NLRA, Sec. 10 (c)). The finality which flows from the absence of exceptions is a "device" adopted to "expedite final determinations and reduce the work load of Board members and their legal assistants."²⁴ Such finality, in effect the consequence of a consent determination, has no

²⁴ 93 Cong. Rec. 6444-5; see also, 93 Cong. Rec. 6860.

counterpart in a case contested before the Board. If exceptions are filed to the intermediate report, the procedure is, as the Board has explained, that:²⁵

. . . the Board, with the assistance of the legal assistants to each Board member who function in much the same manner as law clerks do for judges, reviews the entire record, including the trial examiner's report and recommendations, the exceptions thereto, the complete transcript of evidence and the exhibits, briefs, and arguments. The Board does not consult with members of the trial examining staff or with any agent of the general counsel in its deliberations. It then issues its decision and order in which it may adopt, modify, or reject the findings and recommendations of the trial examiner. The decision and order contains detailed findings of fact, conclusions of law, and basic reasons for decision on all material issues raised, and an order either dismissing the complaint in whole or in part or requiring the respondent to cease and desist from its unlawful practices and to take appropriate affirmative action.

In this manner the statutory mandate is met, namely, "that the Board shall act only on the 'preponderance' of the testimony—that is to say, on the weight of the credible evidence," and that its decisions "should indicate an actual weighing

²⁵ National Labor Relations Board, Rules and Regulations, Series 5, and Statements of Procedure, as amended August 19, 1948, Sec. 202.12, in 29 CFR § 101.12 (1949).

of the evidence, setting forth the reasons for believing this evidence and disbelieving that, for according greater weight to this testimony than to that, for drawing this inference rather than that." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 53-54.

The position of the Board as fact-finder, subject to a single standard of review and unencumbered by limitations flowing from the examiner's preliminary report, is illustrated by the hearing procedure established as an incident to the investigation of questions of employee representation, since the statute provides the same scope of review for findings made in both representation and unfair labor practice cases. In determining whether a question of representation exists, the "hearing may be conducted by an officer or employee of the regional office,"²⁶ but the latter "shall not make

²⁶ As an adjunct to the Board's nonadversary investigation of employee representatives (*Inland Empire District Council v. Millis*, 325 U.S. 497, 706-707), the hearing provided by Section 9 (c) (1) of the National Labor Relations Act is excepted from the requirements of Sections 7 and 8 of the Administrative Procedure Act by virtue of the exemption of agency hearings which involve "the certification of employee representatives" (APA, Sec. 5 (6)). The Board desired the exemption "because of the simplicity of the issues, the great number of cases, and the exceptional need for expedition" in investigating representation questions. Committee Print, S. 7, 79th Cong., 1st Sess., June 1945, 8, in Sen. Doc. No. 248, 79th Cong., 2d Sess., 23. The exemption was explained as appropriate "because these determinations rest so largely upon an election or the availability of an election." S. Rep. No. 752, 79th Cong., 1st Sess., 16; H. Rep. No. 1980, 79th

any recommendations with respect thereto" (NLRA, Sec. 9 (c) (1)). It is "the Board" which "finds upon the record of such hearing that such a question of representation exists" (NLRA, Sec. 9 (c) (1)), and it is "[t]he Board" which "shall decide" the unit appropriate for the purposes of collective bargaining (NLRA, Sec. 9 (b)). Issues of fact determined in a representation proceeding, which are not relitigable in an unfair labor practice proceeding if the issue becomes pertinent therein,²⁷ are entitled on judicial review to the same finality which attaches to facts found through the Board-examiner process.²⁸ In either procedural posture, Section 10 (e) of the Act plainly states that it is the Board's findings of fact, not those of the examiner, which may be contested, and it is the Board's findings of fact, not those of the examiner, which are conclusive:

Cong., 2d Sess., 27; 92 Cong. Rec. 5651; all in Sen. Doc. No. 248, 79th Cong., 2d Sess., 202, 261, 360.

²⁷ *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U.S. 146, 161-162; *National Labor Relations Board v. Worcester Woolen Mills Corp.*, 170 F. 2d 13, 16 (C.A. 1), certiorari denied, 336 U.S. 903; *Allis-Chalmers Mfg. Co. v. National Labor Relations Board*, 162 F. 2d 435, 441 (C.A. 7); *National Labor Relations Board v. West Kentucky Coal Co.*, 152 F. 2d 198, 201 (C.A. 6), certiorari denied, 328 U.S. 866.

²⁸ *Packard Motor Car Co. v. National Labor Relations Board*, 330 U.S. 485, 491-492. Representation determinations are judicially reviewable solely through the avenue of an unfair labor practice proceeding. NLRA, Sec. 10 (d); *American Federation of Labor v. National Labor Relations Board*, 308 U.S. 401; *Norris, Inc. v. National Labor Relations Board*, 177 F. 2d 26 (C. A. D. C.).

The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

Thus the statutory scheme plainly commits fact determination to the Board; "the fact-finder [is] the Board, not the trial examiner."²⁹ Here, no less than in *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285-286, when complaint is made that the Board "did not adopt the recommendations of its examiner," the short answer is that the Board "had the responsibility of decision and was not only at liberty but was required to reach its own conclusions upon the evidence."³⁰

The scope of the Board's decisional responsibility in relation to an examiner's recommendation is thus fundamentally different from the scope of decisional responsibility possessed by a trial court in reviewing a master's findings. Rule 53 (e) (2)

²⁹ *National Labor Relations Board v. Air Associates, Inc.*, 121 F. 2d 586, 588 (C.A. 2); see also, *National Labor Relations Board v. Elkland Leather Co.*, 114 F. 2d 221, 225 (C.A. 3), certiorari denied, 311 U.S. 705; *Burk Bros. v. National Labor Relations Board*, 117 F. 2d 686, 688 (C.A. 3), certiorari denied, 313 U.S. 588; *National Labor Relations Board v. Botany Worsted Mills*, 133 F. 2d 876, 882-883 (C.A. 3), certiorari denied, 319 U.S. 751; *Berkshire Knitting Mills v. National Labor Relations Board*, 139 F. 2d 134, 137 (C.A. 3), certiorari denied, 322 U.S. 747.

³⁰ See also *Smith v. Bowles*, 142 F. 2d 63 (E. C. A.) (Price Administrator).

of the Federal Rules of Civil Procedure provides that in non-jury actions "the court shall accept the master's findings of fact unless clearly erroneous." Congress did not so restrict the power and responsibility of the Board in relation to an examiner's report. And the absence of such restriction, as we shall show, was not a result of mere inadvertence, but reflects the deliberate intention of Congress to obtain in every contested case the benefits of the Board's personalized judgment on all issues of fact and law. It is hardly possible that, having enjoined the Board thus to exercise its independent judgment, Congress intended that difference between the Board and its examiner should itself cast doubt upon the rationality of the Board's findings, or alter the scope of judicial review.

B. THE EXAMINER IS THE MEANS BY WHICH FACTS ARE INTELLIGENTLY FUNNELLED TO THE BOARD FOR ITS INDEPENDENT DETERMINATION

At the root of adjudication, fact-finding is committed to the five members of the Board, or a panel of three (NLRA, Sec. (3 (b))), in order that it may reflect (1) their informed evaluation of fact questions based on the insight and experience of their everyday probing into industrial events, (2) the collective judgment of their joint deliberation,³¹

³¹ "There are recognized advantages of adjudication by group deliberation rather than by individual action; and where a deciding body rather than a single deciding officer

and (3) the uniformity of approach of their centralized administration. Fact-finding in labor disputes, as explained by Judge Learned Hand, calls for and is enhanced by the competence of those adept in it (*National Labor Relations Board v. Standard Oil Company*, 138 F. 2d 885, 888 (C. A. 2)):

Like any other group of phenomena, when isolated and intensively examined, these relations appear to fall into more or less uniform models or patterns, which put those well skilled in the subject at an advantage which no bench of judges can hope to rival.

As an instance of this observation, in noting the skepticism with which the Board regarded a body of testimony, this Court has stated that "Out of repeated instances of hearing the same thing a generalization as to its worth will almost inevitably emerge in the thoughts of a tribunal." *National*

is provided in the agency's organization, it is obviously desirable to realize to the greatest possible extent the advantages thus offered. A decision (whether it be the initial effective decision or a decision on administrative review) which may reverse or modify the conclusions of the officer who presided at the hearing is usually better left to the joint deliberation of a body than to one of its members. The analogy of judicial appellate tribunals is persuasive here. Apart from this factor, joint deliberation should usually produce an inherently better result where adjudication involves difficult questions, whether of law, fact, of policy or of the exercise of discretion." Benjamin, *Administrative Adjudication In The State of New York*, 240-241 (1942).

Labor Relations Board v. Donnelly Garment Co., 330 U. S. 219, 231.

To realize these values, "Congress has deemed it wise to entrust the finding of facts" to the Board, and to "apply an orderly, informed and specialized procedure to the complex administrative problems arising in the solution of industrial disputes". *National Labor Relations Board v. Waterman Steamship Corp.*, 309 U. S. 206, 208-209. And so, it is the Board which is endowed with the "power to draw inferences from the facts" and which has the "function of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony." *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 597. This is especially pertinent when it is recalled that fact-finding is not limited to what it connotes "in the narrow, literal sense" but is also "based upon judgment and prediction." *Securities and Exchange Commission v. Central-Illinois Corp.*, 338 U. S. 96, 126. These advantages would be lost if an element of finality were to attach to an examiner's findings, for the result would be to derogate from the Board's capacity to reach its own uninhibited findings.

The assumption that an examiner's findings are more than advisory "presses too hard the analogy between trial examiner and Board and trial court and appellate court." *National Labor Relations Board v. Botany Worsted Mills*, 133 F. 2d 876, 882 (C. A. 3), certiorari denied, 319 U. S. 751. The

examiner, instead of being a separate tribunal of first instance, is merely an integral link in the Board's single, unified process of decision. Unlike a trial court, the examiner does not decide, he only recommends to the Board.

Manifestly the Board's case load precludes it from presiding at hearings, and in response to the "practicable administrative" necessity for "obtaining the aid of assistants," the examiner system was evolved. "Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates." *Morgan v. United States*, 298 U. S. 468, 481. The examiner's role in the Board's process of adjudication is summarized in its Rules and Regulations.³²

It shall be the duty of the trial examiner to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint. The trial examiner shall have authority, with respect to cases assigned to him, between the time he is designated and transfer of the case to the Board, subject to the Rules and Regulations of the Board and within its powers:

- (a) To administer oaths and affirmations;

³² National Labor Relations Board, Rules and Regulations, Series 5, and Statements of Procedure, as amended August 19, 1948, Sec. 203.35, in 29 CFR § 102.35 (1949).

(b) To grant applications for subpoenas;

(c) To rule upon petitions to revoke subpoenas;

(d) To rule upon offers of proof and receive relevant evidence;

(e) To take or cause depositions to be taken whenever the ends of justice would be served thereby;

(f) To regulate the course of the hearing and, if appropriate or necessary, to exclude persons or counsel from the hearing for contemptuous conduct and to strike all related testimony of witnesses refusing to answer any proper question;

(g) To hold conferences for the settlement or simplification of the issues by consent of the parties, but not to adjust cases;

(h) To dispose of procedural requests or similar matters, including motions referred to the trial examiner by the regional director and motions to amend pleadings; also to dismiss complaints or portions thereof, and to order hearings reopened prior to issuance of intermediate reports (recommended decisions);

(i) To make and file intermediate reports in conformity with section 8 of the Administrative Procedure Act;

(j) To call, examine and cross-examine witnesses, and to introduce into the record documentary or other evidence;

(k) To take any other action necessary under the foregoing and authorized by the published Rules and Regulations of the Board.

At the close of the hearing, a party may argue orally before the examiner and may submit a brief and proposed findings and conclusions.³³ After the hearing, "the trial examiner shall prepare an intermediate report and recommended order, *but the initial decision shall be made by the Board*. Such report shall contain findings of fact, conclusions, and the reasons or basis therefor, upon all material issues of fact, law or discretion presented on the record, and the recommended order shall contain recommendations as to what disposition of the case should be made, which may include, if it be found that the respondent has engaged in or is engaging in the alleged unfair labor practices, a recommendation for such affirmative action by the respondent as will effectuate the policies of the act" (emphasis supplied).³⁴

After issuance of the report, the case is transferred to the Board, together with a record of all the proceedings theretofore had,³⁵ and the case is thereupon ripe for the Board's decision. Exceptions may be filed to the intermediate report, recommended order, or to "any other part of the record or proceedings," together with a supporting

³³ *Id.*, Sec. 203.42 in 29 CFR § 102.42 (1949).

³⁴ *Id.*, Sec. 203.45, in 29 CFR § 102.45 (1949).

³⁵ *Ibid.*

brief, and the "exceptions and briefs shall designate by precise citation the portions of the record relied upon."³⁶ "No matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceedings."³⁷ "Upon the filing of a statement of exceptions and briefs," retaining full power of decision, "the Board may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other Board agent or agency, or may close the case upon compliance with the recommendations of the intermediate report or may make other disposition of the case."³⁸

The relationship of the examiner to the adjudicatory process of the Board is thus apparent from his role in it: (1) Under the examiner's guidance, within the limits of the issues framed by the pleadings, a record is made in an adversary proceeding by which the contestants—the Board's prosecutory staff, the party proceeded against, and at times the private complainant—present their story. (2) The examiner marshals and tentatively resolves the

³⁶ *Id.*, Sec. 203.46 (a), in 29 CFR § 102.46 (a) (1949). If no exceptions are filed, the recommended order becomes the order of the Board without more. *Id.*, Sec. 203.48 (a), in 29 CFR § 102.48 (a) (1949); *supra*, pp. 34-35.

³⁷ *Id.*, Sec. 203.46 (b), in 29 CFR § 102.46 (b) (1949). In a contested case, the Board may, however, *sua sponte* consider aspects of the case to which no exceptions were filed.

³⁸ *Id.*, Sec. 203.48 (b), in 29 CFR § 102.48 (b) (1949).

factual and legal issues, and his report presents the Board with the first disinterested appraisal and analysis of the raw material of the record. (3) With the examiner's report as their guidepost, the contestants by their exceptions urge the deficiencies of his recommended disposition, and thereby the issues for the Board's determination are ordinarily brought into sharp focus.

The examiner is thus the means by which cases are intelligently funneled to the Board for its independent adjudication.³⁹ The fulfillment of this function of the examiner suggests no need for and implies no attribute of finality to his report. Indeed, absence of any degree of finality is an important factor in the successful functioning of the examiner system. For the "necessity of justifying the result of adjudication in each case to an administrative superior with power of decision may well lead to better adjudication by the hearing officer (in the form of recommendations) than he would produce if his work were not thus regularly subjected to review."⁴⁰

A concrete example will illustrate the essential position of the examiner as an assembler of facts.

³⁹ The examiner "is only the conduit through which the [Interstate Commerce] Commission receives the facts on which to base its action." *Empire Trails, Inc., v. United States*, 53 F. Supp. 373, 376 (D. D. C.) (three-judge court).

⁴⁰ Benjamin, *Administrative Adjudication In The State of New York*, 224 (1942).

for the Board's independent determination. In 1947, to meet the amendments of the National Labor Relations Act, the International Typographical Union adopted a collective bargaining policy to be applied by its local unions throughout the country. To test the nature and legal effect of this policy in its various ramifications, five separate proceedings were instituted, two of which were consolidated for hearing, and hearings were conducted by four separate examiners.⁴¹ As was to be expected, the diversified hearings resulted in a variation of views among the four examiners on numerous phases of an essentially unitary situation. Upon consideration of the cases by the Board, the facts adduced at the multiple hearings united to present the Board with facets of a single pattern of conduct, and the Board's unified adjudication of the issues replaced the diffusion of treatment by the examiners. Yet, if the Board was not entirely free to decide the cases without regard to the views of the examiners, the result would be either an absence of uniformity or a greater vulnerability on judicial review in those cases where the Board's

⁴¹ *American Newspaper Publishers Association*, 86 NLRB 951, consolidated for hearing with *Chicago Newspaper Publishers Association*, 86 NLRB 1041 (Trial Examiner Arthur Leff); *Graphic Arts League*, 87 NLRB, No. 124 (Trial Examiner William R. Ringer); *Union Employers' Section of Printing Industry of America*, 87 NLRB, No. 164 (Trial Examiner Howard Meyers); *Daily Review Corporation*, 87 NLRB, No. 101 (Trial Examiner Peter F. Ward).

conclusion did not happen to coincide with that of a particular examiner.

C. DEMEANOR EVIDENCE IS BUT PART OF THE PROCESS OF FACT-FINDING AND IT IS NO EXCEPTION TO THE RULE THAT AN EXAMINER'S FINDINGS ARE ADVISORY ONLY

Uncritical acceptance of the analogy between court and master aside, the only aspect of administrative fact-finding which would accord surface plausibility to the assumption that this Court must attach weight to an examiner's findings reversed by the Board is that which relates to an examiner's resolution of issues as to credibility which ~~are~~ based, in part, on his evaluation of demeanor evidence. But before examining the role of the examiner's evaluation of demeanor evidence in the Board's decisional process generally, and its impact upon judicial review of Board findings, it must be emphasized that this aspect of the fact-finding process is not involved in this case. As we shall see (*infra*, pp. 103-104), in reversing the examiner's finding, the Board did not disturb any judgment of the examiner based upon his observation of the witnesses' demeanor, but merely drew from the objective facts in the record conclusions different from those drawn on the basis of the same record by the examiner. And since, except where credibility recommendations are based upon the examiner's evaluation of demeanor evidence, the Board is in as good a position as the examiner

to resolve issues as to credibility, recommendations as to credibility such as those made by the examiner in this case cannot be treated differently from other recommendations, either as to subsidiary or as to ultimate facts, which there is no justification for treating as final or binding upon the Board.

While all other evidence upon which a trial examiner bases his recommendations is preserved by the record, thereby leaving the Board in as good a position as the examiner to evaluate the relative weight of evidence, draw inferences or resolve conflicts, demeanor evidence is not. Where demeanor evidence plays a part in an examiner's recommendation as to credibility, the Board, since it cannot by "autoptic proference"⁴² appraise the demeanor evidence, must either give weight to the examiner's evaluation, or lose the advantage of such evidence in determining the question of credibility. In deference to the value of demeanor evidence, and because of its essentially incommunicable nature, the Board has evolved a working rule which it has recently restated as follows (*Standard Dry Wall Products, Inc.*, 91 NLRB, No. 103):

* * * In all cases, save only where there are no exceptions to the Trial Examiner's proposed Report and Recommended Order, the Act commits to the Board itself, not to the Board's Trial Examiners, the power and responsibility of determining the facts, as revealed by the

⁴² 1 Wigmore, *Evidence*, § 24, p. 396 (3d Ed., 1940).

preponderance of the evidence.¹ Accordingly, in all cases which come before us for decision we base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner's findings. Nevertheless, as the demeanor of witnesses is a factor of consequence in resolving issues of credibility,² and as the Trial Examiner, but not the Board, has had the advantage of observing the witnesses while they testified, it is our policy to attach great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor.³ Hence

¹ See Sec. 10 (c) of the Act, and compare Sec. 4 (a). See also: *Consumers Power Co. v. N.L.R.B.*, 113 F. 2d 38, 43 (C.A. 6); *N.L.R.B. v. Air Associates, Inc.*, 121 F. 2d 586, 588 (C.A. 2); *N.L.R.B. v. Botany Worsted Mills*, 133 F. 2d 876, 882-883 (C.A. 3); *N.L.R.B. v. Laister-Kauffmann Aircraft Corp.*, 144 F. 2d 9, 16 (C.A. 8); *N.L.R.B. v. Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, 437 (C.A. 5); *N.L.R.B. v. Universal Camera Corp.*, 179 F. 2d 749, 752-753 (C.A. 2), cert. granted May 29, 1950, 339 U.S. 962.

² But only one of the many factors by which credibility is tested. See *Eastern Coal Corporation*, 79 NLRB 1165, 1166 aff'd. 176 F. 2d 131 (C.A. 4). Compare V. Wigmore, Evidence, Sec. 1396 (1940). See also: *N.L.R.B. v. Sartorius*, 140 F. 2d 203, 205 (C.A. 2), enforcing 40 NLRB 107, in which no Intermediate Report was issued; *N.L.R.B. v. Brown Paper Company, Inc.*, 133 F. 2d 988, 990 (C.A. 5); *N.L.R.B. v. Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, 437 (C.A. 5).

³ *Lancaster Foundry Corporation*, 75 NLRB 255, 256; *Robbins Tire & Rubber Company, Inc.*, 69 NLRB 440; *Vermont American Furniture Corp.*, 82 NLRB 408; *Minnesota Mining & Mfg.*, 81 NLRB 557. Compare: *Security Warehouse and Cold Storage Co.*, 35 NLRB

we do not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner's resolution was incorrect.

857, 883-884, enfd., 136 F. 2d 829 (C.A. 9); *Bahan Textile Machinery Co.*, 43 NLRB 97, 100; *Bohn Aluminum and Brass Corp.*, 67 NLRB 847, 849; *Cedartown Yarn Mills*, 76 NLRB 571, 573.

The Board has consistently applied this working rule from the beginning of the Act's administration⁴³ to the present date.⁴⁴

The Board's working rule is consonant with the examiner's advisory function in making a preliminary evaluation of the evidence. The rule announces at the outset the weight the Board will ascribe to demeanor evidence. By acquiring the examiner's "estimate of the veracity of witnesses," the Board becomes as "fully informed" as the

⁴³ *Fashion Piece Die Works, Inc.*, 6 NLRB 274, 279, enforced, 100 F. 2d 304 (C.A. 3); *National Casket Co., Inc.*, 12 NLRB 165, 172-173, enforced as modified, 107 F. 2d 992 (C.A. 2); *Valley Mould and Iron Corp.*, 20 NLRB 211, 219, 220, enforced, 116 F. 2d 760, 763 (C.A. 7).

⁴⁴ *Alex. Milburn Co.*, 78 NLRB 747, 748, n. 2; *Eastern Coal Corp.*, 79 NLRB 1165, 1166, enforced, 176 F. 2d 131 (C.A. 4); *Northeastern Indiana Broadcasting Co.*, 88 NLRB, No. 238. At times, in stating the working rule, the Board has said that it will not reverse an examiner's credibility findings "unless they are clearly erroneous." *Minnesota Mining & Mfg. Co.*, 81 NLRB 557, 559, n. 13, enforced, 179 F. 2d 323 (C.A. 8); *Vermont American Furniture Corp.*, 82 NLRB 408, 409, n. 3. But the difference in phraseology does not reflect a difference in approach. Other agencies have followed the same course. *Supra*, p. 27, n. 21.

nature of formal administrative adjudication permits.⁴⁵ And no more is inherently possible than that, where otherwise feasible (*infra*, pp. 64-65), "he who observes the witness and listens to the evidence must transmit his observations or conclusions to those others who, whether they are superiors or associate members of the same agency, are to decide and this may be done in the form of tentative findings or by a report or recommendations. . . ." ⁴⁶

That the examiner alone is in a position to evaluate demeanor evidence does not, however, relieve the Board of its responsibility to decide questions of credibility, as all other questions of fact, on the basis of the fair preponderance of the

⁴⁵ Benjamin, *Administrative Adjudication In The State of New York*, 226 (1942) ; see also, *id.*, at 231.

⁴⁶ Wolfe, C. J., concurring in *Crow v. Industrial Commission*, 104 Utah 333, 345, 140 P. 2d 321, 326. See also, *United States v. California*, 55 I. D. 532, 540-546 (Secretary of the Interior). Thus, the Attorney General's Committee recommended, with respect to the Federal Trade Commission, that "where the examiner's judgment was influenced by his observation of the witnesses, an effort should be made to embody in the report the impressions which cannot be derived from a mere unaided reading of the record." Att'y. Gen. Comm. Ad. Proc., FTC, Sen. Doc. No. 186, Part 6, 76th Cong., 3rd Sess., 23. And as to the United States Maritime Commission, the Committee similarly stated, "To whatever extent the nature of a particular case made it important that the trial examiner's views should be given especial weight, because of his observation of the witnesses, those views might readily be obtained and could be embodied in the Commission's proposed report." *Id.*, Part 4, 21.

evidence. Where, in the Board's view, the evidence bearing on credibility which the record preserves affords no basis for concluding that the Trial Examiner's inference as to the truthfulness or accuracy of testimony is in error, the Board must generally assume, unless the report on its face discloses the contrary, that the examiner has properly evaluated the demeanor evidence. Acceptance of the examiner's evaluation of demeanor evidence establishes, in such cases, that a preponderance of the evidence supports the examiner's resolution.

But where, in the Board's view, the evidence bearing on credibility which is preserved in the record establishes that the testimony which the examiner credited should have been discredited or *vice versa*, it will not hesitate to reject the examiner's recommendation and substitute its own contrary conclusion.⁴⁷ In such instances, the Board's

⁴⁷ It is of course impossible to catalogue the circumstances which the Board deems persuasive in rejecting an examiner's recommendation concerning credibility; each case necessarily stands on its own bottom. The following cases are illustrative. *Security Warehouse and Cold Storage Co.*, 35 NLRB 857, 883-884, enforced, 136 F. 2d 829 (C.A. 9) (The examiner overlooked the testimony of certain witnesses and their corroborative significance; failed to recognize inconsistencies in testimony; and failed to give proper weight to the employer's hostility to the union); *Bahan Textile Machinery Co.*, 43 NLRB 97, 100 (The record afforded no basis for believing A and B, in one respect, when contradicted by X and Y, and for believing the testimony of X and Y, in another respect, when contradicted by A and B); *Bohn Aluminum and Brass Corp.*, 67 NLRB 847, 849 (The Board discredited a witness

rejection of the examiner's credibility recommendation may be based, singly or in combination, upon such factors as, (1) a view of the case sufficiently different from that of the examiner's as to necessitate a rebalance of the evidence bearing on credibility in the light of the changed perspective (*infra*, pp. 61-63); (2) consideration of objective facts preserved by the record which bear on credibility with sufficient strength to overcome any reasonable influence of demeanor evidence (*infra*, p. 61); and (3) the Board's judgment of the particular examiner's capacity (*infra*, pp. 58-60). In cases where the examiner's ultimate inference as to credibility is found unsound, his evaluation of demeanor evidence, upon which, in part, his inference is based, cannot be accepted as reliable or probative. Thereafter, demeanor evidence, as evaluated by the examiner, is out of the case. And since the Board cannot itself determine the affirmative worth that the demeanor evidence may have, it must base its own finding as to credibility upon the objective evidence in the record, unaided by demeanor evidence. That it may properly do this is established by the numerous cases in which Board decisions have been made and sustained by the courts where

when he deviated from an important aspect of his direct testimony upon cross-examination, and he was otherwise contradicted by both Board and employer witnesses); *Cedartown Yarn Mills*, 76 NLRB 571, 573 (Examiner failed to consider witness' denial of statement attributed to him, and examiner had relied on the absence of a denial in reaching his determination.).

there has been no intermediate report at all by an examiner (*infra*, p. 64 and n. 61).

Neither when the Board accepts nor when it rejects credibility recommendations of an examiner does the propriety of its action in terms of the weight given demeanor evidence become a subject of judicial review. Thus, where the Board adopts the recommendations of an examiner, the question before the court is not whether the Board was correct in finding that the circumstances preserved by the record did not so preponderate against the examiner's resolution as to warrant rejecting his recommendations based in part upon his evaluation of demeanor evidence. Similarly, where the Board reverses the recommendations of an examiner, the question on review is not whether the Board was correct in finding that the circumstances preserved by the record did so preponderate against the examiner's resolution as to warrant its rejection. Such inquiries would involve reweighing of the evidence, a function which, under the substantial evidence rule, courts may not properly perform.

Under the substantial evidence rule, whether the Board has affirmed or reversed recommendations of an examiner, the scope of review remains the same, namely, whether the Board's determination rests upon "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. National*

Labor Relations Board, 305 U. S. 197, 229. In either posture, unless the evidence credited by the Board "carries its own death wound, that is, is incredible and, therefore, cannot in law be credited, and the discredited evidence * * * carries its own irrefutable truth, that is, is of such nature that it cannot in law be discredited" (*National Labor Relations Board v. Pittsburgh Steamship Co.*, 337 U.S. 656, 660), the Board's findings as to credibility may not be upset.

Demeanor evidence, as such, is never before the reviewing court, as it is never before the Board. Where the Board has affirmed findings of an examiner as to credibility, demeanor evidence, as evaluated by the examiner, affords support, of course, for the Board's resolution. That support is lacking when the Board has rejected the examiner's recommended resolution of a question of credibility. But this means no more than that, in such a case, the rationality of the Board's resolution of questions as to credibility must be determined from the bare record. The scope of review is then the same as it was in the *Consolidated Edison* case, 305 U. S. at 226-229, *infra*, p. 64, where the Board findings under review were made without the aid of any report by an examiner. Under this test the Board's finding may not be rejected unless, on the evidence bearing on credibility which the record preserves, the testimony credited by the Board could not as a matter of law have been cred-

ited, and testimony discredited by the Board could not, as a matter of law, have been discredited.⁴⁸

Certainly, a trial examiner's preliminary evaluation of demeanor evidence, which the Board has found insufficient to outweigh the objective evidence bearing upon credibility which the record preserves, cannot suffice to inflict a death wound upon testimony which the Board finds credible, or to stamp with irrefutable truth testimony which, in the Board's view, should not be credited. To hold to the contrary would foreclose the Board from resolving questions as to credibility on the basis of the record as a whole wherever an examiner's recommendations were based in part on his evaluation of demeanor evidence, and would be incompatible with the Board's obligation to determine questions of credibility, like all other questions of fact, on the basis of its view of the fair preponderance of the evidence. It follows that, unless accepted and relied upon by the Board, an examiner's evaluation of demeanor evidence plays no part in judicial review of Board findings as to credibility, and that the Board's reversal of

⁴⁸ The Benjamin Report states that part of the reason for "the test of rationality which the substantial evidence rule provides" is the "circumstance that often the quasi-judicial decision is made by one who has not seen the witnesses or heard their testimony and that the decision may, indeed, be contrary to the recommendation of the hearing officer who did hear the testimony." Benjamin, *Administrative Adjudication In The State of New York*, 338-339 (1942).

an examiner's recommendation does not impair the Board's own finding.

Closer inquiry into the bearing of demeanor evidence on the process of administrative adjudication and the role of such evidence on judicial review of findings as to credibility reveals the necessity for this conclusion.

1. The worth of demeanor evidence depends on the competence of the observer. Judgment is required to distinguish between the well-told story of the sophisticated liar and the halting testimony of an honest but timorous witness. No weight attaches to the evaluation of an examiner who would use as a guide, as did one trial judge in instructing a jury, "that 'wiping' one's hands while testifying was 'almost always an indication of lying.'"⁴⁹ And an examiner, like any other trier of fact, may be influenced in evaluating testimony by his own irrational "reactions to women, or red-headed women, or spinsters, or to bearded men, or men with squints or nervous mannerisms, or to Catholics, or Masons, or Republicans, or labor leaders, when any such persons testify."⁵⁰

But while such infirmities exist in the use of demeanor evidence, they usually do not manifest themselves on the face of the record so as to be

⁴⁹ *Quercia v. United States*, 289 U.S. 466, 472. For a criticism of over-reliance on demeanor evidence, see Blume, *Review of Facts In Non-Jury Cases*, 20 J. Am. Jud. Soc. 68, 71-72 (1936).

⁵⁰ Frank, *Say It With Music*, 61 Harv. L. Rev. 921, 936 (1948).

correctible as such as they occur. In consequence, as the court below observed, the "weight to be given to another person's conclusion from evidence that has disappeared, depends altogether upon one's confidence in his judicial powers" (R. 163). Since the capacity of examiners is not fungible, the extent of the Board's reliance on the examiner's opportunity to observe the demeanor of the witness, as the court below further explained, "will depend upon what competence the Board ascribes to the examiner in question," and the Board will "have means of informing itself about his work" (R. 163).⁵¹ This is the administrative analogue to this Court's observation in *Maggio v. Zeitz*, 333 U.S. 56, 70, namely, that the "Court of Appeals for each circuit also has the advantage of closer familiarity with the capabilities, tendencies, and practices of the referee and District Judge."

Thus the Board may rightly take into account the varying ability of its examiners in judging the value of their recommendations as to demeanor evidence. But on judicial review, this ability factor is unknown to the court, and in the absence of such relevant information as to the examiner's capacity, the court has no means of intelligently

⁵¹ Thus, in making assignments of examiners to hear cases, the agency may take into consideration "the capabilities of the examiners in question." Sellers, *Adjudication By Federal Agencies Under The Administrative Procedure Act*, in *The Federal Administrative Procedure Act and The Administrative Agencies*, 536 (1947).

reviewing the Board's rejection of the examiner's evaluation.⁵² The Board's acceptance or rejection of demeanor evidence is, therefore, necessarily outside the purview of judicial review, for review cannot be exercised in the absence of pertinent data.

Petitioner characterizes this position as subjecting the examiner's "findings" to the "unexpressed whim of the Board" (Br. p. 32). But the nature of the problem requires that "[a]dherence by the administrative tribunal" to a "standard of responsible adjudication must necessarily be left to the good faith of the tribunal."⁵³ Some reliance must be placed upon integrity in the performance of duty and upon the monitorship of public, congressional and executive scrutiny. *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 146. And it must be remembered that Congress left to the Board, not to reviewing courts, the responsibility of determining where the preponderance of the evidence lies.

⁵² In the fiscal year ending June 30, 1949, the Board issued formal decisions in 484 unfair labor practice cases, and thereby became familiar with the caliber of the examiners' performance as shown by the records in those cases; but in the same period of time, only fifty cases, distributed among the eleven Courts of Appeals, were subject to judicial review. *National Labor Relations Board*, 14th Ann. Rep., pp. 1, 110 (1950).

⁵³ Benjamin, *Administrative Adjudication In The State of New York*, 336 (1942).

2. Demeanor evidence⁵⁴ aside, credibility may be evaluated by such sundry "demonstrable factors as the inherent probability or lack of probability of testimony, contradiction of a witness on a material matter by his own contrary statement or by another witness called by the same party; failure to offer, produce on request, or account for the absence of supporting records; and failure to call material witnesses." ⁵⁴ Thus, demeanor evidence is but one factor in the determination of credibility; and credibility is but one facet in the process of fact-finding. Every element in this complex of factors—inference, weight, circumstance, credibility, undisputed evidence, the rule of law itself ⁵⁵—interacts with every other to influence the final fact-determination. A change in the emphasis on one item affects the significance of another and requires the reordering of the whole.

To illustrate by reference to the simple situation presented in this case, the Board was of the view that, in reaching his fact conclusions, (1) the examiner was "guided by a standard" of proof "more rigorous" than a "*preponderance* of the evidence" (R. 12, n. 2), and (2) the examiner failed to attach sufficient weight to the ire and animosity which Kende entertained toward Chairman because of his testimony at the representation

⁵⁴ *Eastern Coal Corp.*, 79 NLRB 1165, 1166, enforced, 176 F. 2d 131 (C.A. 4).

⁵⁵ Frank, *Say It With Music*, 61 Harv. L. Rev. 921, 947-948 (1948).

hearing (R. 13 and n. 4). The attachment of different values to these factors required that other associated elements in the fact equation be re-balanced to achieve a true result. Demeanor evidence is not immune from such rebalance, for like other items of evidence, the value given it depends in significant part on the impact of related data.

As a result, in exercising its fact-finding function in any individual case after receipt of the examiner's report, the Board is necessarily required to consider anew the influence to be allotted demeanor evidence in the light of its own independent and perhaps different appraisal of other evidence. On judicial review, however, if the limits of the substantial evidence rule are to be respected, consideration of this issue is not open to the court. Unlike the Board, the court cannot independently evaluate the significance of the competing evidence, in the light of which the demeanor evidence was discounted, for the court is denied the power to substitute "its judgment on disputed facts for the Board's judgment . . ." ⁵⁶ The board's assessment of demeanor evidence cannot, therefore, be tested in terms of whether the court would have taken the same view of the competing evidence as did the Board. The remaining course theoretically open to the court would be to inquire whether a rational fact-finder of first instance could have been influ-

⁵⁶ *National Labor Relations Board v. Waterman Steamship Corp.*, 309 U.S. 206, 226.





enced to assess the demeanor evidence differently if he had also made a different evaluation of the competing evidence. A statement of this inquiry discloses its illusory and futile character. The interaction of facts is such that it could hardly ever be said that a material change in one item of evidence could not rationally induce an alteration in the evaluation of another; in this case, it could not be said that had the examiner approached the case with the perspective adopted by the Board, the examiner's evaluation of demeanor would not have altered.⁵⁷ In any event, the conceivable benefits of such speculative judicial inquiry would be too meager to justify its pursuit.

3. Judicial review loses none of its corrective value by excluding from its purview the question whether the Board properly discounted the examiner's demeanor recommendation. Intelligent fact-finding, and in consequence intelligent judicial review, can exist without the aid of demeanor evidence. In old equity practice "the usual method of taking testimony had been by deposition;"⁵⁸ modern practice retains full utilization of depositions

⁵⁷ Even if it were practically feasible, a remand to the examiner to ascertain his view of demeanor evidence in the light of the Board's differing view of the other evidence would be fruitless, because the lapse of time would have destroyed the freshness of the examiner's observation of demeanor, thus depriving it of much of its value.

⁵⁸ Clark and Stone, *Review of Findings of Fact*, 4 U. of Chi. L. Rev. 190, 204 (1937).

and interrogatories in appropriate circumstances;⁵⁹ and a reference to a master "may direct him . . . to receive and report evidence only" but to make no findings.⁶⁰ In formal administrative adjudication, before the issuance of an intermediate report was made mandatory by the Administrative Procedure Act (*infra*, pp. 69-71), at times facts were found without aid of any examiner recommendations, and the sufficiency of the process was expressly approved. *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350-351; *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 226-229.⁶¹ And Section 5 (c) of the Administrative Procedure Act, in requiring that the "same officers who preside at the reception of evidence . . . shall make the recommended decision or initial decision," ex-

⁵⁹ Fed. R. Civ. Proc., 26-33; *Lacomastic Corp. v. Parker*, 54 F. Supp. 138, 141 (D. Md.).

⁶⁰ Fed. R. Civ. Proc., 53 (c); *Carpenter, Babson & Fendler v. Condor Pictures, Inc.*, 110 F. 2d 317 (C.A. 9); cf., *Kimberly v. Arms*, 129 U.S. 512, 523 ("The information which [the master] may communicate by his findings in such cases, upon the evidence presented to him, is merely advisory to the court, which it may accept and act upon or disregard in whole or in part, according to its own judgment as to the weight of the evidence.").

⁶¹ See also, *National Labor Relations Board v. A. Sartorius & Co., Inc.*, 140 F. 2d 203, 204, 205 (C.A. 2); *National Labor Relations Board v. Ford Motor Co.*, 114 F. 2d 905, 909 (C.A. 6), certiorari denied, 312 U.S. 689; *National Labor Relations Board v. Hearst*, 102 F. 2d 658, 662 (C.A. 9); *National Labor Relations Board v. Biles Coleman Lumber Co.*, 98 F. 2d 16, 18 (C.A. 9).

pressly states "except where such officers become unavailable to the agency." Thus, where the examiner becomes unavailable by virtue of such circumstances as disqualification,⁶² resignation,⁶³ or death,⁶⁴ findings may be made without the assistance of demeanor evidence.⁶⁵

In sum, proper emphasis upon the importance of demeanor evidence should not obscure realization that less than its full utilization may at times be necessary in order to give effect to the broader and more meaningful purposes underlying formal administrative adjudication and its judicial review.⁶⁶ Unless the tail is to wag the dog, it needs

⁶² *National Labor Relations Board v. Dixie Shirt Co.*, 176 F. 2d 969, 971 (C.A. 4), enforcing, 79 NLRB 127-128.

⁶³ *National Electric Products Corp.*, 80 NLRB 995-996.

⁶⁴ *B. F. Goodrich Co.*, 88 NLRB No. 117; *Stocker Mfg. Co.*, 86 NLRB 666.

⁶⁵ Observation of the witnesses "is the basis for this insistence that the man who heard the evidence shall write the decision," and the "statute goes as far as it can towards the realization of that goal, but allows for contingencies. . . ." Sellers, *Adjudication by Federal Agencies Under The Administrative Procedure Act*, in *The Federal Administrative Procedure Act and The Administrative Agencies*, 539 (1947). "The work-a-day world is no place for the perfectionist." *National Labor Relations Board v. Air Associates, Inc.*, 121 F. 2d 586, 590 (C.A. 2).

⁶⁶ Compare 5 Wigmore, *Evidence*, § 1396 (1940): "the secondary advantage, incidentally obtained for the tribunal by the witness' presence before it—the demeanor evidence—is an advantage to be insisted upon whenever it can be had. No one has doubted that it is highly desirable, if only it is available. But it is merely desirable. Where it cannot be obtained, the requirement ceases."

to be recalled that commitment of fact-finding to the Board is bottomed on considerations other than the advantages in appraising demeanor evidence (*supra*, pp. 39-41), and that finality of Board findings on review rests similarly on considerations other than demeanor evidence (*infra*, pp. 77-81). Demeanor evidence is but part of the process of fact-finding, and it is no exception to the rule that in the scheme of administrative adjudication an examiner's findings are advisory only (*National Labor Relations Board v. Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, 437 (C.A. 5)):

The Board is in no case bound to follow the fact-findings or recommendations of an examiner. Even on a question of the credibility of contradictory witnesses, notwithstanding the advantage the examiner has of seeing and hearing them testify, the Board may differ from the conclusion of its examiner. * * * We must assume a conscientious and fair consideration of the evidence by the Board and are bound by all its fact-findings which are supported by substantial evidence, regardless of the opinion of the examiner or ourselves as to the real truth.

Accord: *National Labor Relations Board v. Laister-Kauffmann Aircraft Corp.*, 144 F. 2d 9, 16-17 (C.A. 8); *National Labor Relations Board v. Security Warehouse & Cold Storage Co.*, 136 F. 2d 829, 830-831, 834 (C.A. 9); *National Labor Relations Board v. Brown Paper Mill Co.*, 133 F. 2d 988, 990 (C.A.

5); *Burk Bros. v. National Labor Relations Board*, 117 F. 2d 686, 688 (C.A. 3), certiorari denied, 313 U.S. 588; *Lacomastic Corp. v. Parker*, 54 F. Supp. 138, 139-142 (D. Md.). See also, *National Labor Relations Board v. A. Sartorius & Co.*, 140 F. 2d 203, 205 (C.A. 2).

D. THE ADMINISTRATIVE PROCEDURE ACT DOES NOT ATTACH FINALITY TO AN EXAMINER'S FINDINGS

This analysis of the relationship of the Board to its examiners is unchanged by the Administrative Procedure Act upon which petitioner relies (Br. pp. 27-29, 34-35). The responsibility for "actual decision" remains with the Board. *Willapoint Oysters, Inc. v. Ewing*, 174 F. 2d 676, 696 (C.A. 9). On consideration by the Board, "the findings, conclusions, and orders of the examiner" still "are only tentative or interlocutory in nature." *Sisto v. Civil Aeronautics Board*, 179 F. 2d 47, 51 (C.A.D.C.). The function of the Board-examiner process continues to be "to insure procedures by which parties may be fully informed of the issues and proposed grounds of decision and be afforded full opportunity to be heard upon these issues and grounds." *Western Union Division v. United States*, 87 F. Supp. 324, 334 (D.D.C.) (three-judge court).

A principal purpose of the Administrative Procedure Act is the enhancement of the stature of the hearing officer in order to foster the conditions of responsible adjudication. To give the examiner

an adjudicatory status of independence and dignity within the administrative process, the Act requires his functional separation from the agency's investigative and prosecutory staff, provides him with assured position and means, and seeks to install able examiners.⁶⁷ Commensurate with this status, "to assure that the presiding officer will perform a real function rather than serve merely as a notary or policeman,"⁶⁸ examiners are authorized, "subject to the published rules of the agency and within its powers, to" (APA, Sec. 7 (b)):

- (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

These are the very responsibilities which Board examiners are presently entrusted to perform (*supra*, pp. 42-44). The effective discharge of these

⁶⁷ APA, Secs. 5 (c), 11; *Wong Yang Sung v. McGrath*, 339 U.S. 33.

⁶⁸ S. Rep. No. 752, 79th Cong., 1st Sess., 21; H. Rep. No. 1980, 79th Cong., 2d Sess., 35; both in Sen. Doc. No. 248, 79th Cong., 2d Sess., 207, 269.

functions does not require, however, that the agency be bound, in some degree, to accept the examiner's findings, and the stature of the examiner, which the Administrative Procedure Act seeks to elevate, is not demeaned by the absence of such finality. Though the "findings of the examiner are advisory only," the "function of the examiner is not simply ministerial. The role which he fills is significant. The very essence of a fair hearing may depend on his conduct."⁶⁹ There is nothing, therefore, in the general attributes of an examiner's position to support an inference that his findings are more than advisory.

Turning from the examiner's general status to the explicit authority conferred upon him to "make decisions or recommend decisions in conformity with section 8," the examiner's exercise of this authority likewise leaves the agency heads with the prerogative of free decision. Section 8 of the Administrative Procedure Act, as it applies in pertinent part to adjudication, provides that:

(a) Action by subordinates.—In cases in which the agency has not presided at the recep-

⁶⁹ Mr. Justice Douglas, with whom Justices Black, Byrnes, and Jackson concurred, dissenting in *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 371, from a holding that the Administrator of the Fair Labor Standards Act was without authority to delegate his subpoena power to subordinates. Mr. Justice Douglas' quoted view, however, represents that of the full court, for one of the reasons the majority advanced against delegability was that the logic of the argument would permit the Administrator to delegate his fact-finding function, a result thought unthinkable (315 U.S. at 361).

tion of the evidence, the officer who presided . . . shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. *On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision.* Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision . . .

(b) Submittals and decisions.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include

a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. [Emphasis supplied.]

The Board's present practice is a precise assimilation of the overall procedure thus prescribed (*supra*, pp. 42-45). The central attribute of this procedure is insistence upon an intermediate examiner decision,⁷⁰ whether recommended or initial. Until the enactment of the Administrative Procedure Act, an examiner's report was important as a means of affording a litigant "a reasonable opportunity to know the claims of the opposing party and to meet them" (*Morgan v. United States*, 304 U.S. 1, 18), but so long as the issues were otherwise "clearly defined," its omission was without significance (304 U.S. at 26; *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350-351), although the use of an examiner's "tentative report with an opportunity for exceptions and argument thereon" was regarded as the "better practice" (*Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 228).⁷¹ It is this "better practice" which the Administrative Procedure Act makes manda-

⁷⁰ It may, however, be waived. S. Rep. No. 752, 79th Cong., 1st Sess., 23, 43, in Sen. Doc. No. 248, 79th Cong., 2d Sess., 209, 229.

⁷¹ See also *National Labor Relations Board v. Air Associates, Inc.*, 121 F. 2d 586, 591 (C.A. 2).

tory.' It is the "device" which "must be used to bridge the gap between the officials who hear and those who decide cases."⁷² Its use in the decisional process assures "all parties an opportunity to present their views of the law and the facts and be heard thereon prior to the decision of any case."⁷³

But the mandatory issuance of an examiner's report does not bind the agency to the findings embodied in it. Whether the examiner makes an initial decision or recommends a decision, and either course may be adopted by the agency as it chooses,⁷⁴ the agency retains full revisory authority

⁷² S. Rep. No. 752, 79th Cong., 1st Sess., 24; H. Rep. No. 1980, 79th Cong., 2d Sess., 38; 92 Cong. Rec. 5653; all in Sen. Doc. No. 248, 79th Cong., 2d Sess., 210, 272, 366.

⁷³ 92 Cong. Rec. 5653, in Sen. Doc. No. 248, 79th Cong., 2d Sess., 367.

⁷⁴ S. Rep. No. 752, 79th Cong., 1st Sess., 23, 43; H. Rep. No. 1980, 79th Cong., 2d Sess., 38; both in Sen. Doc. No. 248, 79th Cong., 2d Sess., 209, 229, 272. The option given the agency is explained in the Committee Print, S. 7, 79th Cong., 1st Sess., June 1945, 15, in Sen. Doc. No. 248, 79th Cong., 2d Sess., 32-33:

The Attorney General's Committee recommended that the officer or officers who presided at the reception of evidence should not merely make recommendations to the agency in which they serve, but should go further and make an initial decision binding upon the parties in the absence of administrative or judicial review (*Final Report*, pp. 50-53). This subsection, however, leaves it to the agency to choose either in the individual case or in all cases whether the officer or officers who heard the evidence shall actually decide the case or merely make a recommended decision for the further consideration of the agency.

over his findings when the case is before it. If the agency retains for itself the authority to make the initial decision and permits the examiner only to recommend a decision, as the Board has consistently done since the enactment of the Administrative Procedure Act,⁷⁵ there is no question that the examiner's findings are advisory only. The very concept of a recommendation negatives the idea of compulsion or finality and leaves the subject open for free decision. Thus, since in conformity with the option given it by the Administrative Procedure Act, the Board requires its examiners to recommend decisions only, nothing in that Act lends an aura of finality to examiners' findings or detracts from the authority of the Board to substitute its own without constraint.

The distinction between an examiner's initial decision and recommended decision apparently is that an initial decision will receive agency review only if there is dissatisfaction with it, manifested either by appeal to the agency or by motion of the agency, whereas a recommended decision always contemplates some further consideration by the agency.

⁷⁵ National Labor Relations Board, Rules and Regulations, Series 4, effective September 11, 1946, Sec. 203.38 ("... the Trial Examiner shall prepare an Intermediate Report (recommended decision), but the initial decision shall be made by the Board."); *id.*, Series 5, effective August 22, 1947, Sec. 203.45 ("... the trial examiner shall prepare an intermediate report and recommended order, but the initial decision shall be made by the Board."); *id.*, Series 5, as amended August 19, 1948, Sec. 203.45, in 29 CFR § 102.45 (1949) ("... the trial examiner shall prepare an intermediate report and recommended order, but the initial decision shall be made by the Board.").

Even if the examiner makes the initial decision, Section 8 (a) of the Administrative Procedure Act is explicit in its statement that on "appeal from or review of the initial decisions of such officers *the agency shall . . . have all the powers which it would have in making the initial decision*" (emphasis supplied). Thus, in words as clear as language can be, the APA confirms the agency's complete freedom of decision, for had the agency made the initial decision, nothing would have hindered the full exercise of its revisory authority over the examiner's recommended findings.⁷⁶

⁷⁶ Careful comment on this section appears to be uniform in adopting this view. Davis, *Institutional Administrative Decisions*, 48 Col. L. Rev. 173, 188 (1948) (The agency has power to make "a full substitution of judgment on all questions."); Nathanson, *Some Comments On The Administrative Procedure Act*, 41 Ill. L. Rev. 368, 394-396 (1946); Letter of the Attorney General appended to S. Rep. No. 752, 79th Cong., 1st Sess., 43, in Sen. Doc. No. 248, 79th Cong., 2d Sess., 229 (The agency "may make entirely new findings either upon the record or upon new evidence which it takes."); Attorney General's Manual On The Administrative Procedure Act, 83 (1947) ("In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself."). See also, Rep. Att'y Gen. Comm. Ad. Proc., 53 (1941) ("Agency heads should have the authority, when reviewing hearing commissioners' determinations, to affirm, reverse, modify (including the power to make the finding which they deem required by the record), or remand for further hearing.").

In explaining the agency's retention of "all the powers" of decision, the Senate Report stated,⁷⁷ as did the House Report in practically identical terms,⁷⁸ that this "does not mean that the initial examiners' decisions (or their recommended decisions) are without effect. They become a part of the record in the case."⁷⁹ They would be of conse-

⁷⁷ S. Rep. No. 752, 79th Cong., 1st Sess., 24, in Sen. Doc. No. 248, 79th Cong., 2d Sess., 210.

⁷⁸ H. Rep. No. 1980, 79th Cong., 2d Sess., 38-39 in Sen. Doc. No. 248, 79th Cong., 2d Sess., 272-273. The House Report added, however, that "In a broad sense the agencies' reviewing powers are to be compared with that of courts under section 10 (e) of the bill." If more is involved in this comparison than recognition of a surface resemblance between successive determinations, the description is too "broad" to be apt, for it would assimilate the agency-examiner relationship to that of agency-court, and as the court below observed, "it is safe to say that the words will not bear so much" (R. 6). See especially, Nathanson, *Some Comments On The Administrative Procedure Act*, 41 Ill. L. Rev. 368, 395 (1946). Thus, under no view are the examiner's findings conclusive if supported by substantial evidence; in reviewing the remedy recommended by the examiner, the agency is not limited to "the narrow confines of law" but may enter the "more spacious domain of policy" (*Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 194); and on questions of law, the examiner's judgment is not "entitled to great weight" (*Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U.S. 678, 681, n. 1).

⁷⁹ Until Section 8 (b) of the APA made this requirement explicit, there was a school of thought which deemed the examiner's report to be no part of the formal record of the agency's proceedings. 1 Pike & Fischer Ad. Law (Current Text) § 63a.16; see, *B. & O. R. Co. v. United States*, 298 U.S. 349, 370; *Arrow-Hart & Hegeman Elec. Co. v. Federal Trade Commission*, 63 F. 2d 108 (C.A. 2); *Raladam Co. v. Federal*

quence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing." This explanation is fully consistent with the advisory nature of the examiner's findings. The examiner's demeanor recommendations are "of consequence" in the Board's decisional process (*supra*, pp. 49-51). An examiner's decisions may have "effect" and be "of consequence" without making them a factor on review, for the examiner's competence, experience, and fairness in making his intermediate report may influence the final decision in significant measure. Thus, although a District Judge's treatment of questions of law has no binding quality on appeal, the cogency of his presentation is intrinsically influential. The gloss of the APA is, therefore, consistent with its text in attaching no element of finality to an examiner's report.

E. THE RELATIONSHIP OF AGENCY TO COURT PRECLUDES THE USE OF EXAMINER RECOMMENDATIONS TO DETRACT FROM THE FINALITY ACCORDED FINDINGS OF THE BOARD

We have shown that the relationship of the Board to its examiners requires that an examiner's

Trade Commission, 42 F. 2d 430, 432 (C.A. 6), affirmed on other grounds, 283 U.S. 643; *Algoma Lumber Co. v. Federal Trade Commission*, 56 F. 2d 774 (C.A. 9); *Federal Trade Commission v. Hires Turner Glass Co.*, 81 F. 2d 362, 364 (C.A. 3); *Kidder Oil Co. v. Federal Trade Commission*, 117 F. 2d 892, 894-895 (C.A. 7). The Board, however, has always included

findings have no more than an advisory function. We now show that the relationship of the Board to reviewing courts equally compels the conclusion that contrary recommendations of an examiner may not be used to detract from the weight accorded findings of the Board.

1. *Judicial Review is Limited In Order To Give Effect To The Board's Judgment Of Facts.* The congressional objective in reposing the fact-finding function in the Board is to secure its experienced and unified judgment in the specialized field committed to its administration (*supra*, pp. 39-41).⁸⁰ For this reason, on judicial review, the Board's findings of fact are "conclusive" unless they are outside the bounds of rational entertainment. A difference of opinion does not mean that the prevailing view is unreasonable. Variance between the Board and its examiner has no tendency to establish that the Board's view is irrational. Such variance, therefore, affords no reason, on judicial review, for displacing the administrative judgment.

Indeed, were difference of opinion pertinent to show unreasonableness, disagreement among Board

the intermediate report as part of the record in the case. National Labor Relations Board, Rules and Regulations, Series 1, September 14, 1935, Sec. 31.

⁸⁰ See also, Stern, *Review of Findings of Administrators, Judges and Juries*, 58 Harv. L. Rev. 70, 99-109 (1944); Cox, *Judge Learned Hand And The Interpretation of Statutes*, 60 Harv. L. Rev. 370, 391, n. 58 (1947).

members themselves, even more than disagreement between the Board and its examiner, would tend to diminish the weight to be accorded the majority action. Yet it is settled that, where dissent exists, the "legal effect of the challenged report and order is the same as if supported by all members" of the agency. *B. & O. R. Co. v. United States*, 298 U. S. 349, 362.⁸¹ The "Board acts as a unit, and a dissent no more reduces the legal effect of its findings and order than does a dissenting opinion of a member of a court detract from the legal effect of the court's judgment." *Sperry Gyroscope Company, Inc. v. National Labor Relations Board*, 129 F. 2d 922, 924 (C. A. 2).⁸² Difference of opinion therefore cannot of itself detract from the substantiality of the evidence supporting the Board's findings. Indeed, where division exists, promotion of the congressional policy of entrusting fact-finding to the Board is enhanced by resolving doubts in favor of the Board's judgment.

2. *To Detract From The Substantiality Of The Board's Findings Because Of Difference With The Examiner Would Make The Standard Of Judicial Review Too Indefinite.* In its petition for

⁸¹ See also *Packard Motor Car Co. v. National Labor Relations Board*, 330 U.S. 485, 492-493.

⁸² See also, *National Labor Relations Board v. Sartorius*, 140 F. 2d 203, 205-206 (C.A. 2); *National Labor Relations Board v. Leviton Mfg Co.*, 111 F. 2d 619, 621 (C.A. 2); *Doyle Transfer Co. v. United States*, 45 F. Supp. 691, 695 (D. D. C.) (three-judge court).

certiorari (p. 14), petitioner conceded that the position of an examiner in administrative proceedings is not assimilated to that of a master in federal practice so as to make the examiner's findings of fact final unless clearly erroneous. In its brief, however, petitioner now contends "that the examiner should assume the same relationship to the Board as does a master *vis a vis* a court" (Br., p. 34). Petitioner's initial concession was nevertheless a necessary one.

The finality which attaches to a master's findings "unless clearly erroneous" (Fed. R. Civ. Proc., 53 (e) (2)), and as to a District Judge's findings (Fed. R. Civ. Proc., 52 (a)), extends to all elements of the fact equation, including weight, inference, and credibility.⁸³ It is safe to say that under no view is such enforced impotency placed on an agency in its relationship to its examiner. Moreover, the reference to a master may direct him "to receive and report evidence only," but to make no findings (*supra*, p. 64), thus enabling the District Judge to control the master's role in terms of his ability and the intricacy of the case. No such power would inhere in the Board, thus disabling it, beyond even what the Federal Rules of Civil

⁸³ *Anderson v. Clemens Pottery Co.*, 328 U.S. 680, 689; *Walling v. General Industries Co.*, 330 U.S. 545, 550; *United States v. United States Gypsum Co.*, 333 U.S. 364, 394; Note to Rule 52, Fed. R. Civ. Proc.

Procedure would require, from accommodating to the circumstances of particular litigation.

Petitioner's initial position (Pet. for Cert., p. 14), to which it now adheres as an alternative ground (Br., pp. 34-35), is that "the absence of a precise standard defining the weight to be given examiner's findings does not justify disregarding them altogether," and proposes that on judicial review "it is possible to ascribe some weight to the fact that the Board reversed a trial examiner without precisely defining the exact weight to be given." In rejecting this contention, the court below explained that it "was unable to apply so impalpable a standard;" that "it is practically impossible for a court, upon review of those findings which the Board itself substitutes, to consider the Board's reversal a factor in the court's decision;" and that it could find no "middle ground between doing that and treating such a reversal as error, whenever it would be such, if done by a judge to a master in equity" (R. 162-163).

Such a forceful judicial expression of infeasibility, by a court experienced in factual review and notably alert both to its own capacity and to administrative needs, is entitled to great respect. Moreover the indefiniteness of so immeasurable a criterion as "some weight" emphasizes the danger of its unconscious use as means of substituting judicial for administrative judgment. When it is recalled that the "effectiveness" of even an articu-

lated standard of review "will depend largely upon the attitude with which the case is approached"⁸⁴ the risk cannot be dismissed as fanciful. Finally, to ascribe some detractive weight to the Board's reversal of an examiner's findings would create two standards of judicial review, one to be applied to the concurrent findings of Board and examiner, and a more rigorous one to be applied where division exists (*supra*, p. 30). But Congress established only one standard of review, the substantial evidence rule and that was to be applied *to the Board's* findings.

In sum, the contention that an indefinite element of finality attaches to an examiner's findings which, upon reversal, detracts from the substantiality of the Board's substituted findings, rests upon no more than an uncritical analogy between the examiner and agency relationship, on the one hand, and the trial and appellate court relationship, on the other. It repeats, therefore, the error of failing to observe "vital differentiations between the functions of judicial and administrative tribunals," and, in consequence, it reads "the laws of Congress through the distorting lenses of inapplicable legal doctrine." *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 144; see also, *National Labor Relations Board v. Donnelly Garment Co.*, 330 U. S. 219, 227.

⁸⁴ *Dobson v. Commissioner of Internal Revenue*, 320 U.S. 489, 501.

III. SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT CHAIRMAN WAS DISCHARGED BECAUSE HE GAVE TESTIMONY

Substantial evidence on the record considered as a whole supports the Board's finding that Chairman was discharged because he gave testimony at a Board hearing. The subsidiary elements of this finding are: (1) By testifying at a Board representation hearing on November 30, 1943, in opposition to the stand taken by petitioner, Chairman aroused the strong animosity of Chief Engineer Kende, who desired to discharge him because of the adverse evidence he gave; (2) Kende promptly investigated Chairman's employment history, in an effort to unearth a basis for discharge; because he could not find support for the immediate reasons which suggested themselves, inefficiency and Communist affiliation, he did not then dismiss Chairman, but his desire and intention to uncover a pretext warranting discharge continued unabated; (3) on January 24, 1944, eight weeks later, Kende summarily discharged Chairman, utilizing as his pretext an incident of asserted insubordination which had occurred three and one-half weeks before on December 30, 1943. In this view of the facts the discharge violated Section 8 (1) and (4) of the Act whether or not in belatedly bringing the incident to Kende's attention Weintraub was motivated in part or in whole by his knowledge of Kende's desire to find some pretext which would enable him to dismiss

Chairman. The crucial question is whether Kende's animus against Chairman because of his testimony played a part in Kende's decision to discharge him. The Board's conclusion that it did, as the court below held, is a rational appraisal of the evidence.

As explained by the Court of Appeals for the Fourth Circuit in stating the settled rule pertaining to the adjudication of discriminatory discharges, "It must be remembered, in this connection, that the question involved is a pure question of fact; that in passing upon it, the Board may give consideration to circumstantial evidence as well as to that which is direct; that direct evidence of a purpose to violate the statute is rarely obtainable; and that where the finding of the Board is supported by the circumstances from which the conclusion of discriminatory discharge may legitimately be drawn, it is binding upon the Courts, as they are without power to find facts, or to substitute their judgment for that of the Board."⁴⁴ In applying this rule, and holding that the Board's conclusion was "within the bounds of rational entertainment," the court below cut to the nub of this case insofar as judicial review is concerned in stating (R. 165):

When all is said, Kende had been greatly outraged at Chairman's testimony; he then did

⁴⁴ Parker, C. J., in *Hartsell Mills Co. v. National Labor Relations Board*, 111 F. 2d 291, 293 (C.A. 4).

propose to get him out of the factory; he still thought at the hearing that he was unfit to remain; and he had told Weintraub to keep watch on him. We cannot say that, with all these circumstances before him, no reasonable person could have concluded that Chairman's testimony was one of the causes of his discharge, little as it would have convinced us, were we free to pass upon the evidence in the first instance.

In this Court, by analogy to the two-court rule, judicially approved agency findings are rarely to be disturbed.⁸⁴ Accordingly, the Board's finding that Chairman was discharged because he gave testimony should be affirmed as supported by substantial evidence on the record considered as a whole.

Contrary to petitioner's contention (Br. pp. 35-46), the Board carefully considered all of the items of evidence in the record in reaching its decision, it carefully stated the reasons for its inability to accept those findings of the examiner which it rejected and it did not substitute "expertness for evidence,"⁸⁵ see *infra*, p. 87, note 87. The fact that

^{84b} See *National Labor Relations Board v. Falk Corp.*, 308 U.S. 453, 461; *International Association of Machinists v. National Labor Relations Board*, 311 U.S. 72, 75; *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350, 357.

⁸⁵ Petitioner's contention, based on the legislative history of the amended Act, that Congress intended to preclude the Board from substituting "expertness for evidence", cannot serve to deprive the Board of its power and duty to assess the significance of evidence and to draw inferences therefrom in the light of the Board members' knowledge of industrial con-

the Board, like any other fact finder, was required to and did draw inferences as to intent from the evidence does not mean, as petitioner seems to assume, that the Board's findings were not grounded in the evidence. We turn now to the subsidiary findings and the evidence.

The Board's basic subsidiary findings rest in large measure upon admissions by petitioner itself; when Chairman's testimony was relied upon, it was corroborated by credible evidence.

A. The Factors Showing the Discriminatory Purpose. When petitioner's officials were apprised by Chairman's presence at the first session of the representation hearing that he would testify in opposition to their stand, they at once sought to dissuade him, warning him that by testifying he would jeopardize his position with the Company.⁸⁶

ditions and labor relations. Cf. *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 800, and Brief for the National Labor Relations Board in opposition in *LaSalle Steel Co. v. National Labor Relations Board*, No. 701, October Term, 1949, pp. 18-21, certiorari denied, 339 U.S. 963. Expertness cannot substitute for evidence; what it can and must do is to reveal the meaning and significance of evidence which would be lost upon one inexperienced in the field. It was primarily to secure the advantage of such assessment that the Board, an administrative agency, was created by Congress to adjudicate unfair labor practice cases, see pp. 39-41; *supra*.

⁸⁶ Petitioner contends (Br., pp. 35-38) that the Company had no adverse interest in the representation case and that its motive for opposing Chairman's appearance as a witness and its hostility to him for testifying is therefore without rational explanation. But petitioner's counsel admitted at

When Chairman disregarded these warnings and testified in opposition to the Company's stand, Kende, as petitioner's counsel admitted at the hearing, became "incensed" (Tr. 532). After admittedly denouncing Chairman for having "perjured himself" (R. 64, *supra*, p. 7), Kende (R. 65), promptly undertook to discover an excuse for discharging him (*supra*, p. 7). Contrary to Kende's hopes, Politzer reported that Chairman's work was satisfactory, and Kende fared no better when he tried to fasten the label of Communist on Chairman. However, he did not drop the project of getting rid of Chairman. Still "very angry" with Chairman (Tr. 1010-1011, cf. Tr. 532), Kende instructed Politzer "to keep an eye on the man's work" (R. 66). It was no secret that, as Politzer and Goldson told Chairman, "on account of [your] going down to give testimony [the Company is] after [your] scalp" (R. 47, *supra*, p. 9).

The evidence thus unmistakably establishes Kende's hostility to Chairman, aroused by his testimony, and the purpose to discharge him because of it. Kende's purpose was known both to Wein-

the hearing that "the Company would have preferred that no new union be introduced into the picture" (Tr. 526). See also the decision of the Board in *Universal Camera Corporation*, 54 NLRB 1037. The testimony of Chairman, the only supervisor who appeared in support of the A.F.L., at the representation hearing, was obviously regarded by the Company as contrary to its interests. As Politzer admitted at the hearing (Tr. 1010-1011), Kende was "very angry with [Chairman] *for having to fight him.*" (Italics added.)

traub and to Politzer. Only an appropriate excuse, to hide the real reason, was then missing. As the Board found (R. 14), Kende's animus against Chairman for testifying did not abate, and his plan "to find a pretext for discharging him," was "not shown to have been abandoned." Indeed, the testimony of Kende himself shows that that plan was continued in operation, for, at the conference, Kende admittedly instructed Politzer to keep watch on Chairman (Tr. 565-566).⁸⁷ In these circumstances, the Board was reasonable in viewing the alleged basis for discharge with skepticism (cf. *National Labor Relations Board v. Stowe Spinning Co.*, 336 U. S. 226, 230-231), and in requiring petitioner to overcome the heavy onus with which its attitude had burdened it. As the Board said (R. 13):

In the face of this clear evidence of the [petitioner's] animus against Chairman and its desire and intention to discharge him because of his testimony at the Board hearing if a pretext could be found, it was incumbent upon the [petitioner] to go forward to show convincingly that when Chairman was actually dis-

⁸⁷ Under these circumstances, the Board was impelled to reject the Trial Examiner's appraisal that the conference of December 1st between Kende, Weintraub and Politzer did not result in "any plan for Chairman's discharge." Contrary to petitioner's assertion (Br., pp. 36, 40, 42-43) the Board adequately explained its reasons for rejecting the Examiner's conclusion by stating (R. 13, n. 4), "the Trial Examiner discounts the significance of the conference and Kende's motivation as revealed by it."

charged—by Kende himself—8 weeks later, ostensibly because of an episode that was then stale, the real reason was something other than Chairman's appearance as a witness.

"We shall now show that it was rational to conclude that petitioner did not overcome the Board's *prima facie* case. Cf. *Montgomery Ward & Co., Inc. v. National Labor Relations Board*, 107 F. 2d 555, 560 (C. A. 7); *National Labor Relations Board v. Remington Rand, Inc.*, 94 F. 2d 862, 872 (C. A. 2), certiorari denied, 304 U. S. 576.

B. *The Incident Of Asserted "Gross Insubordination"*⁸⁸ *Utilized to Discharge Chairman.* On the night of December 30, 1943, when Weintraub demanded that Chairman discharge Kollisch, Chairman explained that he had directed Kollisch to stand by for emergency service. When Weintraub nevertheless persisted in his demand, Chairman, noting that he needed Kollisch's services that night, referred Weintraub to Plant Engineer Politzer because the latter was Chairman's "superior" (R. 48). Weintraub's intemperate retort, (R. 28; 48, 69, *supra*, p. 10) drew from Chairman as mild a response as could have been expected.⁸⁹ After Weintraub ordered Chairman to leave the plant, Zicarelli, a union shop steward, intervened and induced Chairman and Weintraub to

⁸⁸ Petitioner's Answer before the Board.

⁸⁹ See p. 92, *infra*.

shake hands and forget the quarrel.⁹⁰ Chairman then finished his shift without further incident. (*Supra*, pp. 9-10.)⁹¹

In the Board's view, two factors combine to show that this incident was not the "real reason"⁹² for Chairman's ultimate discharge on January 24, 1944: (1) Kende's action in ruling "peremptorily in Weintraub's favor, without questioning Chairman himself, or otherwise investigating the December 30 incident," "despite Politzer's opposition," although by the time Kende heard of it the incident was "stale" (R. 13, 14); and despite the fact that the incident was not, as the Company claimed, "an instance of 'gross insubordination' on Chairman's part," but "was, at most, only a squabble between two supervisors, one of whom, Chairman reasonably questioned the other's authority in the circumstances" (R. 13); (2) Weintraub's unexplained delay for three and one-half weeks in bringing the incident to Kende's attention, during which period Chairman was "neither reprimanded . . . for his supposed impertinence" nor was "any disciplinary action" taken "against him" (R. 13-14).

⁹⁰ Weintraub said (R. 49), "Well, I acted kind of harsh and I shouldn't have done that, so let us forget it."

⁹¹ This version of the incident is based on the testimony of Chairman and Zicarelli which the Trial Examiner and the Board credited. Weintraub gave an entirely different version of the incident (R. 14, n. 6, 27-29).

⁹² *National Labor Relations Board v. Electric City Dyeing Co.*, 178 F. 2d 980, 982 (C. A. 3).

1. *Kende's motive:* The Board was reasonable in concluding that but for Kende's animosity toward Chairman and his desire to find a pretext for discharging him because of his testimony, Kende would not have reacted to the incident by summarily discharging Chairman. This is true whether or not Weintraub was influenced by his knowledge of Kende's animus toward Chairman in reviving the December 30 incident when he did. Testing the stated reason for the discharge in terms of the result it would normally produce, it is unlikely that a reasonable employer in Chief Engineer Kende's position would have reacted to the quarrel by discharging Chairman, were he not actuated by a discriminatory purpose.

a. Weintraub's quarrel with Chairman was precipitated by a dispute as to whether Weintraub was authorized to order Chairman to discharge a rank-and-file employee. The managerial hierarchy in the plant ascended from Chairman to Plant Engineer Politzer, who in turn was responsible to Chief Engineer Kende, who in his turn, was answerable to Vice President Shapiro (R. 65, 69-70). As personnel manager, Weintraub did not normally give orders to employees, who, after being hired, were assigned to the mechanical engineering phase of the plant work which came under Kende's "supreme supervision" (*ibid.*). Neither Kende nor anyone else ever authorized Weintraub to discipline Politzer, nor did Kende "ever designate

... Weintraub to discipline men directly responsible to ... Politzer" (R. 70). Furthermore, at the time of Chairman's discharge Politzer himself firmly understood that Weintraub had no authority over Chairman. He testified revealingly that when Kende sided with Weintraub, he was "mad at Mr. Weintraub's going over my head and Mr. Kende having backed Weintraub up" (R. 86). He felt then that Weintraub's action was "interference in my department" and that in defending Chairman, "I was really going to bat for myself. I felt that Weintraub was lowering me in my own eyes by giving my men orders" (R. 88, 89). Politzer also said that he knew that those in his department understood that he was their superior (R. 88), and respondent does not even claim to have made known any authority on Weintraub's part over Politzer's subordinates.

Thus, as the Board found, when Chairman declined to follow Weintraub's order, Chairman "reasonably questioned the other's authority in the circumstances" (R. 13). Consequently, although Kende ruled that "Weintraub was specifically designated to supervise order and general discipline in the plant" and "he was within his authority to act as he did" (R. 69), the lines of authority in the plant were sufficiently obscure so as to afford no reasonable occasion for discharge on that account. Since this "squabble between two supervisors" (R. 13), in which Weintraub par-

anticipated without credit to himself, called for clarification of authority, not dismissal, it is unlikely that in the absence of another motive, a reasonable employer in Kende's position would have acted as Kende did.

b. Whether or not Weintraub was drunk on the night of his quarrel with Chairman, his words and actions were not those of a temperate person, for no sensible individual, even if his authority is defied, tells another: "I have such powers from the War Department that if I want to—I can slap a man, 'I can kill a man if I want to' " (*supra*, p. 10).⁹³ Chairman's response "If you are drunk, please go home and sleep it off" (*supra*, p. 10), was thus not without warrant. With the provocation for it in mind, it is unlikely that a reasonable employer in Kende's position would take seriously Weintraub's complaint that failure to discharge Chairman for calling him "drunk would lower his prestige in the eyes of the" personnel (R. 84). It is of the utmost significance in evaluating Kende's reaction that, in similar circumstances, where Chairman had responded to Kende's charge of perjury by commenting "if you call me a liar you are a liar," Kende did not regard Chairman's response as one warranting any disciplinary action whatever, despite the fact that Kende was then searching for a pretext which would warrant Chairman's

⁹³ Weintraub did not specifically deny making these statements to Chairman. Zicarelli corroborated Chairman's testimony on this point (R. 60).

discharge. In testifying at the hearing concerning the factors which made him angry with Chairman, Kende did not even mention Chairman's counter-accusation that Kende had lied (Tr. 548, 561, 566). It is clear, therefore, that normally, absent a discriminatory motive, Kende would have evaluated Chairman's imputation of drunkenness to Weintraub in the light of the provocation therefor, and as a result, would not have discharged him.

Even assuming that the provocation would not have served to absolve Chairman entirely, it would certainly have served to make the extreme penalty of discharge inappropriate. Thus, even Politzer who, at the time of the hearing, was a strong partisan of the Company's position, stated (Tr. 1120), that now "I can see [Weintraub's] point that anyone questioning his authority and *getting away without some sort of reprimand* would make it harder for [Weintraub] to perform his duties" (italics added).

c. Kende apparently first heard of the December 30 incident on January 24, after three and a half weeks had elapsed and the incident was already stale. For a responsible official like Kende to order the discharge of an employee because of an incident which, though known to the supervisory staff for so long a time, had not theretofore been called to his attention, is not natural.⁶⁴ Apparently

⁶⁴ The usual industrial understanding pertaining to the remission of stale plant offenses has been lucidly stated by

Kende himself realized the arbitrariness of his conduct, for at the hearing he sought to make it appear that it was not he, but Weintraub who discharged Chairman on the 24th, and indeed that "Whether Chairman was thereafter fired or whether he left on his own steam, I actually did not know and did not inquire into. I became aware two or three days later that he was no longer with us because Politzer came to my office in connection with a question of replacing him." (Tr. 663).

d. Kende ordered Chairman's discharge without affording him an opportunity to explain his position and without otherwise investigating the matter. Kende's "summary ruling" (R. 14) is not the action of a reasonable employer. To discharge an employee, particularly a supervisor, "summarily, without preliminary warning, admo-

Professor Harry Schulman while acting as permanent arbitrator under the Ford-UAW (CIO) collective bargaining agreement (*Ford Motor Co.*, Opinion A-156, 1944, in Schulman and Chamberlain, *Cases On Labor Relations*, 51 (1949)):

But it is true that disciplinary action, if taken, must be taken fairly closely after the commission of the offense. Not all shop offenses are made the occasion for disciplinary penalties; many are, for one reason or another, permitted to die without consequence. If an offense is not followed by disciplinary action fairly promptly, it becomes part of the great past, an incident to be recalled as a missed opportunity or a lucky break. It cannot later be revived as the occasion for current disciplinary action.

nition or opportunity to change the act or practice complained of . . . is not natural." ⁹⁵

e. Kende ordered Chairman's discharge despite the fact that he was conscious of the "great shortage" of engineers (R. 71) and of the fact that the Company had had a "great deal of difficulty filling that position in the past" (R. 86). Indeed, after Chairman's discharge, Kende himself pointed out to Politzer that it would be impossible to replace him with a person of comparable skill (R. 71, 86). Normally, Kende, as Chief Engineer, would not have suffered the loss of an efficient engineer in circumstances where, as here, an alternative to his discharge was feasible.

Accordingly, since Kende's discharge of Chairman deviated markedly from the action to be expected of a reasonable employer uninfluenced by a discriminatory motive, it was rational for the Board to conclude that but for the "extreme animus" (R. 14) aroused by his testimony at a Board hearing Chairman would not have been dismissed. This is all the more reasonable since the representation case in which Chairman adversely testified was still undecided at the time of his discharge and therefore still fresh in Kende's mind by virtue

⁹⁵ *E. Anthony & Sons v. National Labor Relations Board*, 163 F. 2d 22, 26 (C. A. D. C.), certiorari denied, 332 U. S. 773.

of its pendency.⁹⁶ Indeed, in its brief before the court below petitioner itself recognized that the merits of the December 30 incident, and Weintraub's request ~~that~~ Chairman be dismissed because of it, could not adequately explain Kende's decision to discharge Chairman. Petitioner there stated, Kende's "own estimate of Chairman's personality *naturally* entered into his decision to support Weintraub" (Br. 19). Under these circumstances the reasonableness of the Board's finding that what actually influenced Kende's decision was his animus against Chairman for testifying is beyond dispute.

2. *Weintraub's unexplained delay.* Petitioner explains Weintraub's delay in bringing the incident to Kende's attention in the following fashion: The second work day after the incident of asserted "insubordination," Personnel Manager Weintraub pursued his desire for Chairman's discharge with Plant Engineer Politzer, and Politzer assured Weintraub that Chairman had stated he would resign shortly; willing to await Chairman's voluntary resignation, Weintraub did not further press the matter until about three weeks later when he "noticed" (R. 77) that Chairman was still in the plant;⁹⁷ again taking up the matter of Chairman's

⁹⁶ The representation case was decided on February 2, 1944, nine days after Chairman's discharge. *Universal Camera Corp.*, 54 NLRB 1037.

⁹⁷ Indicating the unreliability which permeates the testimony of petitioner's officials, in contrast to Weintraub's

discharge with Politzer, Weintraub insisted upon his dismissal, and upon Politzer's refusal, the two presented the question to Chief Engineer Kende who ordered Chairman's discharge. The Board's rejection of this version of events as a fabrication was rational.

According to both Chairman and Politzer, Chairman reported to work as usual the first work day after Weintraub's wrangle with him. He told Politzer of the incident, including a statement that Weintraub had been drunk, and asked whether Weintraub had authority to give him orders. Politzer did not reprimand or discipline Chairman; on the contrary, he stated that Weintraub was not his boss and that Weintraub was "out of order" in seeking to assert authority over Chairman. Politzer added that he would see to it that Weintraub kept his promise to forget the matter. (*Supra*, pp. 10-11.)

The critical question arises from the fact that Politzer claimed that a day or two later Chairman told Politzer that he would resign and Politzer relayed this information to Weintraub. Chairman denied ever telling Politzer that he would resign and the trial examiner, rejecting Politzer's testimony, credited Chairman's denial. The trial

statement that he "noticed Mr. Chairman on the floor" (R. 7), Kende testified that Weintraub told him he "realized" that Chairman "had still not resigned" "since he had the personnel records of resignations, terminations, and so forth" (R. 69).

examiner found nevertheless that Politzer told Weintraub that Chairman would resign. To credit this portion of Politzer's testimony required the examiner to infer, as he did, that in making this report to Weintraub Politzer was either mistaken or had lied. But the Board believed that Politzer never told Weintraub that Chairman would resign and that in testifying to the contrary, as in testifying that Chairman allegedly told him he would resign, Politzer was lying.⁹⁸

This resolution is supported by the fact that in testifying as to those events which "lay exclusively within" their "own knowledge,"⁹⁹ petitioner's officials were in sharp conflict with one another, and as to those events in which independent evi-

⁹⁸ In estimating Politzer's veracity it should be borne in mind that an excellent reason existed for the disparity between his testimony and the events which actually occurred. As the examiner pointed out, during the period of Chairman's employment "Poltzer was friendly with Chairman and did try to help him" (R. 27, n. 7). Politzer then "felt resentment against the Company because he was not consulted by top management concerning the men under his supervision" (R. 27, n. 7; Tr. 953-954, 974, 998-1000, 1012-1013, 1019, 1034-1035, 1044, 1117-1118). But prior to the unfair labor practice hearing, Politzer "reconsidered his position and felt that he had been wrong in his attitude towards the Company" during the period pertaining to Chairman's discharge (*ibid.*). After Chairman's discharge Politzer may have feared that if he testified against the Company his own position would be in jeopardy. See note 102, p. 105, *infra*.

⁹⁹ *National Labor Relations Board v. Remington Rand, Inc.*, 94 F. 2d 862, 872 (C. A. 2), certiorari denied, 304 U. S. 576.

dence was available, that evidence was incompatible with their version.

Politzer's testimony. Politzer testified that the second work day after the incident, he encountered Weintraub in the corridor outside his office, and Weintraub stated, "I hear you have been investigating me as to whether I was drunk or not" (R. 83). After Politzer answered "Yes," Weintraub denied that he had been drinking, and added, "I was going to forget this whole matter with Imre but since he is raising the issue of drunkenness, I want him fired. I argued with" Weintraub, but Weintraub "wouldn't listen," and the two parted (R. 84). Later in the day, on seeing Chairman, Politzer "told him that Weintraub was insisting that he be fired," and Chairman, "kind of blue," said, "The men in the shop wouldn't back me up. I am going to quit. I will give you my written resignation and I will quit in about ten days." (R. 84.) Thereupon, Politzer telephoned this information to Weintraub who stated, "if that is the way he wants it, I will play ball with him" (*ibid.*).

Weintraub's testimony. In marked divergence from Politzer's testimony, Weintraub testified only that on seeing Politzer the "very next day after the incident" (R. 79), "before I could even go into it," Politzer told him "that he knows all about it" and "that Chairman had resigned and was going to leave within ten days to two weeks"

(R. 80). Weintraub stated, "Fine. I will let it ride until he leaves" (R. 80).¹⁰⁰

There is thus no agreement between the testimony of Politzer and Weintraub, both company officials, except as to one item, critical to petitioner's explanation for the delay, namely, that Politzer told Weintraub that Chairman would resign shortly. But whether to accept this isolated segment of testimony as truthful may fairly be tested in relation to the reliability of the other intertwined testimony of the same witnesses. The "facts disputed in litigation are not random unknowns in isolated equations—they are facets of related human behavior, and the chiseling of one facet helps to mark the borders of the next. Thus, in the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next." *National Labor Relations Board v. Pittsburgh, S. S. Co.*, 337 U.S. 656, 659.

So appraised, the testimony of Politzer and Weintraub, both testifying for the same party and

¹⁰⁰ In further explanation of his agreement to wait for Chairman's resignation Weintraub testified (Tr. 922) "my pride isn't that important that I couldn't get Mr. Politzer to take the time he needed properly—to have somebody else put in his place." It is significant in evaluating Weintraub's testimony, that even after Chairman's discharge the Company made no effort to obtain an outside replacement, on the ground that no competent engineers could be found (Tr. 1000-1001). Yet, this factor did not deter Weintraub from pressing for Chairman's discharge.

with the same interest, manifests such contradiction and inherent improbability as to warrant rejection in whole. Politzer places his conversation with Weintraub two working days after the incident with Chairman; Weintraub states it occurred the "very next day after the incident." Politzer describes a lengthy personal meeting with Weintraub and a later telephone conversation; Weintraub tells of single brief personal encounter. Politzer relates a full discussion with Weintraub, beginning with Weintraub's protest against the investigation of his reported intoxication, his willingness "to forget the whole matter" until he found that Chairman was "raising the issue of drunkenness," his consequent insistence that he be "fired," a futile effort to dissuade him, and a later telephoned report that Chairman would resign; negating practically all of Politzer's account, Weintraub states merely that "before" he "could even go into" the matter of his quarrel with Chairman, Politzer told him without more that Chairman would resign, and the conversation ended.

Leaving the contradictions between Politzer and Weintraub, we turn to the inherent improbability of Politzer's account of his conversation with Chairman. Politzer states that Chairman, "kind of blue," told him, "The men in the shop wouldn't back me up. I am going to quit. I will give you my written resignation and I will quit in about ten days." At the time of Chairman's asserted

statement that the "men in the shop wouldn't back me up" there was no probable basis for its utterance. It was only recently that Chairman had materially helped the men in their quest for union representation; his encounter with Weintraub stemmed from his refusal to discharge a rank-and-file employee; and upon the occasion of Chairman's ultimate discharge, but for his intervention, the men might have struck in his support, and the union steward did speak to the management on his behalf (R. 52). And it is even more unlikely that Chairman offered to resign. In keeping with his independence of spirit, which he exhibited in testifying at the representation hearing despite warnings from Politzer and Goldson and also in refusing to submit passively to Chief Engineer Kende's censure of his testimony (R. 45, 58, 64), it was highly improbable to suppose that Chairman would resign as a consequence of a dispute in which he felt he was in the right. Indeed, on January 11 or 12, 1944, about two weeks after his asserted offer to resign, when Politzer did in fact ask Chairman to "consider" resigning, according to Chairman's uncontradicted testimony, he emphatically refused, stating, "I know that they want to do something because I helped the men and testified for them . . . I never quit under fire and I will see it through to the end" (R. 14, 31; 51). Furthermore, although Politzer promptly sought a replacement for Chairman when the latter was actually discharged on January 24 (R. 86-87, 71),

there is no showing that Politzer took any steps to obtain a replacement for Chairman after the latter purportedly stated he was leaving. It is plain, therefore, as Chairman testified (R. 51), and as both the Board and the examiner found (R. 30-31), that Chairman never stated he would resign.

Thus, because the testimony with which it is intimately interlaced is extremely questionable, it is rational to conclude that Politzer did not tell Weintraub that Chairman would resign. The examiner's contrary conclusion was based upon the admitted fact that on January 11 or 12, Politzer asked Chairman whether he would consider resigning (R. 31; 164; 51).¹⁰¹ The examiner's conclusion was therefore not based upon the demeanor

¹⁰¹ The court below also thought this fact supported the examiner's conclusion (R. 164). On the other hand, however, this view is opposed by the credited testimony of union shop steward Zicarelli that Weintraub told him the day after the quarrel that the incident "is forgotten" (R. 14, n. 6, 63). Moreover, suggestions to Chairman from management officials that he resign had evidently been bruited about from the very time of his testimony at the representation hearing. A few days after the representation hearing, Goldson, a supervisor with status equal to Chairman's had told Chairman: "Imre, you better watch out. If you have anything which is not all right with you, *you better resign* and don't fight them because otherwise, you know that Kende has all the reports in, and your application blank, and they want to see if they can get rid of you" (R. 47, *supra*, p. 9, n. 10, emphasis supplied). On January 11, Politzer, in effect, indicated to Chairman that Weintraub wanted him to resign. It may well be that this suggestion to resign was but Weintraub's attempt to ease

of Politzer, but upon objective facts which the record preserved and the significance of which the Board was free to evaluate *de novo*.

The propriety of the Board's reversal of the examiner on this point is illustrated by the fact that to support his conclusion that Politzer did tell Weintraub that Chairman would resign the examiner was forced to indulge in surmise as to why Politzer would make a concededly false report to Weintraub. The examiner thought the explanation might be either that Politzer made an "honest mistake" in his report to Weintraub or that he may have been motivated "by the thought that the quarrel between Weintraub and Chairman might be soon forgotten if action was delayed" (R. 33). But the Board could rationally conclude that this surmise was without support. Every reason which makes it unlikely that Chairman would offer to resign makes it equally unlikely that Politzer, knowing Chairman as he did, could have imputed such a purpose to Chairman as an "honest mistake." Nor is it likely that Politzer would have made the statement in order to appease Weintraub. Politzer's testimony indicates that at that time he was in no mood for appeasement. He was very angry at what he considered Weintraub's inter-

Chairman out of his job without the necessity of bringing the December 30 incident and Weintraub's part in it to Kende's attention. These competing considerations simply highlight the principle that the job of piecing together conflicting items of evidence into a harmonious mosaic is for the Board.

ference in matters not his concern (R. 87, 88), and as he stated, "I was really going to bat for myself. I felt Weintraub was lowering me in my own eyes by giving my men orders" (R. 89). Appeasing Weintraub at that time would have been furthest from Politzer's mind; indeed, if there was any discussion of the incident at all, Politzer would most likely have made an issue of the question of Weintraub's authority, as he did on January 24 (R. 84). Moreover, to assume that Politzer was appeasing Weintraub requires the conclusion that he was deliberately lying on the witness stand, for if appeasement was his motive, he could have so testified, instead of telling the story he did. Every view of the facts, therefore, impels the conclusion that Politzer at no time told Weintraub that Chairman would resign.¹⁰²

Thus, contrary to the impression of the court below (R. 163), the examiner's conclusion that Politzer told Weintraub that Chairman would resign did not rest upon his evaluation of demeanor evidence, but upon his assumption that Wein-

¹⁰² That Politzer, at the time of the hearing, was willing to fabricate when he believed fabrication would help petitioner's case is apparent from his attempt to convey the impression that at the conference on December 1, in Kende's office, he volunteered to "check into [Chairman's] work further" (Tr. 969, 1064-1065), thereby absolving Kende of having instructed him to do so, which was one of the most damaging features of the case against petitioner. Compare Kende's admission (R. 66) that it was in fact he who instructed Politzer to keep watch on Chairman.

traub's delay must be explained and that only such a report as Politzer purportedly made to Weintraub would explain it. It was this assumption which required him to indulge in surmise as to why Politzer would make a concededly false report to Weintraub—a surmise unsupported even by Politzer's testimony. Moreover, even if the examiner had relied on demeanor evidence, it requires an uncommon degree of acuity in the evaluation of demeanor evidence, which the Board is not bound to assume the examiner has, to pick a single thread of truth from a web of falsehood. Furthermore, the examiner had found, and the Board relied upon his recommendation, that both Politzer and Weintraub "were unreliable witnesses in many respects" (R. 14).¹⁰³ Thus the examiner "found [Politzer's] testimony in many respects to be vague and unreliable" (R. 27, n. 7, see also R. 32, 33), and in four separate instances of conflict between the testimony of Chairman and

¹⁰³ We do not disagree with the observation of the court below that "nothing is more common in all kinds of judicial decisions than to believe some and not all" (R. 164). But it is equally true that, "in the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next." *National Labor Relations Board v. Pittsburgh S. S. Co.*, 337 U. S. 656, 659. Each approach has a rational basis in human experience, and whether one or the other is adopted in the evaluation of testimony in a given case depends on the circumstances which commend themselves to the fact-finder as more nearly in accord with the truth. Neither approach can ordinarily be regarded as irrational, and accordingly that adopted by the fact-finder must be left undisturbed.

Politzer, the examiner credited Chairman (R. 25; 26, n. 5; 29, 30). In like fashion the examiner discredited significant aspects of Weintraub's testimony (R. 29, 30).

Accordingly, it was rational for the Board to conclude that Politzer did not tell Weintraub that Chairman would resign, and therefore "that the record contains no credible explanation of Weintraub's failure to call for disciplinary action against Chairman, on account of their quarrel on December 30, until about a month after the event" (R. 14). This conclusion is affirmatively corroborated by the credited testimony of Zicarelli, the union shop steward, that the day after the quarrel Weintraub told him that "it is forgotten" (R. 14, n. 6; 63). It is further corroborated by the fact that during the conversation of January 11, when Politzer advised Chairman that Weintraub wanted to bring the matter up again, Politzer, according to Chairman's uncontradicted testimony, commented that Weintraub "is acting funny, and he [Politzer] does not understand" (R. 51). Politzer would hardly have found Weintraub's attitude on the 11th "funny" or difficult to understand if Weintraub from the beginning had insisted on Chairman's leaving, and Politzer had told him that Chairman would resign. Thus, as the Board found (R. 14), the examiner's conclusion that Politzer told Weintraub that Chairman would resign "is irreconcilable with the other re-

lated facts, and all the other evidence bearing on Politzer's behavior and attitude at that time."

In view of the absence of any other credible explanation, and the fact that the explanation offered by petitioner's witnesses was a fabrication, the Board was likewise reasonable in concluding that Weintraub's revival of the December 30 incident, which he had spontaneously agreed to "forget," and in which his role was none too creditable, was reasonably explained only by petitioner's "extreme animus" against Chairman because of his testimony, and by Weintraub's knowledge that Kende was seeking a pretext for discharging him.

C. The Immateriality Of Whether Kende Alone Seized On Weintraub's Complaint As A Pretext Or Whether Weintraub Was Also Influenced By Kende's Desire To Discharge Chairman For His Testimony In Bringing The December 30 Incident To Kende's Attention. The Board found that alternative means may have been resorted to in order to exploit Weintraub's complaint as a pretext to accomplish Chairman's discriminatory discharge. That is, Kende alone may have been awaiting an opportunity to be rid of Chairman, and the Board emphasized this view by twice stressing it, once when it stated that "Chairman incurred the hostility of the [petitioner], and especially of Chief Engineer Kende, who ultimately discharged him" (R. 12), and later when

it stated that "Chairman was actually discharged —by Kende himself" (R. 13). Alternatively, Weintraub may have been influenced in bringing the matter to Kende's attention by his knowledge that Kende sought to utilize some plausible incident as a basis for Chairman's dismissal, and that, in this sense, it was because of Chairman's testimony that "Weintraub and Kende brought about Chairman's discharge" (R. 15). The Board stressed the immateriality of any specific plan shared by Weintraub and Kende, no less than the immateriality of whether Weintraub was discriminatorily motivated, for it stated that "neither in this, nor in any similar case, is it necessary that we have positive proof blue-printing the *method* whereby that discrimination was planned and accomplished" (R. 14, n. 7).¹⁰⁴

Accordingly, rational support for either alternative requires affirmance of the Board's finding that Chairman was discriminatorily discharged. We have already shown at length that it was reasonable to conclude that Kende, acting from discriminatory motivation, whether or not shared by Weintraub, ordered Chairman's dismissal. It is also reasonable to conclude that Weintraub was influenced by Kende's discriminatory motivation

¹⁰⁴ It was the examiner's insistence upon just such "blue-printing," as disclosed by the character of his findings, that prompted the Board to observe that "in weighing the evidence" the examiner "was guided by" too "rigorous" a "standard" (R. 12, n. 2, see also, R. 13, n. 4).

and that he acted in accord with Kende's plan to utilize some incident to effect a discriminatory discharge in reviving the December 30 incident.

The court below read the Board's findings (R. 14, n. 7), as holding that in reviving the incident of December 30, Weintraub was acting pursuant to a specific agreement between Weintraub and Kende made after the December 30 incident, an agreement from which Politzer had been excluded, rather than pursuant to Kende's plan to discharge Chairman on a pretext, a plan which Kende had revealed to both Politzer and Weintraub at the conference on December 1. We do not so read the Board's findings. The Board refrained from overturning the examiner's finding that there was no "explicit understanding between Kende and Weintraub, subsequent to the conference on December 1, that Weintraub would either create the December 30 incident itself, or exploit that particular incident as the basis for Chairman's discharge." The Board pointed out that the specific conspiracy theory was one "which the Examiner suggests and finds unproved." The Board did not indicate that it adhered to the theory, or that, unlike the Examiner, it believed that theory to have been proved. It specifically stated that it was unnecessary to "have positive proof blue-printing the *method* whereby * * * discrimination was planned and accomplished (R. 15, n. 7). The only basis for assuming that the Board found

that there was an explicit agreement between Kende and Weintraub is the Board's use of the phrase "Weintraub and Kende brought about Chairman's discharge" (R. 15, n. 7). But this phrase merely describes the sequence of events leading to the discharge; it does not embody a conclusion that Weintraub and Kende were co-conspirators.

IV. THE BOARD MAY ORDER THE REINSTATEMENT WITH BACK PAY OF A SUPERVISOR WHO, PRIOR TO THE AMENDMENT OF THE NATIONAL LABOR RELATIONS ACT, WAS DISCRIMINATORILY DISCHARGED FOR TESTIFYING IN A BOARD PROCEEDING.

As we have seen, on November 30, 1943, at a Board representation hearing, Imre Chairman, a supervisory employee, testified in support of the position of a group of rank-and-file maintenance employees that it constituted a unit appropriate for collective bargaining. Because of his testimony, Chairman was discharged by petitioner on January 24, 1944, in violation of Section 8 (4) of the original NLRA, which forbade an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." To remedy this discriminatory discharge, the usual Board proceedings were undertaken and completed through the issuance of the intermediate report before the NLRA was amended, but the Board's order did

not issue until August 31, 1948, more than a year after the amendments became effective on August 22, 1947. Except that it was renumbered 8 (a) (4), the amendments made no change in Section 8 (4); the definition of the term "employee" contained in Section 2 (3) however was amended to exclude from its purview "any individual employed as a supervisor."

The Board did not pass upon the question whether this change permitted an employer in the future to discharge a supervisor for testifying in a proceeding before the Board;¹⁰⁵ but, relying upon the general saving statute which prevents the extinguishment of a liability incurred under a repealed statute unless the repealing act expressly provides for it,¹⁰⁶ the Board entered an order requiring petitioner to offer reinstatement to Chairman and to make him whole for any loss of pay he sustained during the period of his discriminatory discharge to the date reemployment

¹⁰⁵ The court below expressly stated that this is "a question we assume, but do not decide" (R. 165). See *Inter-City Advertising Co.*, 89 NLRB No. 127, for a situation in which the discharge of a supervisor may continue to be an unfair labor practice, remediable by his reinstatement with back pay, because it was effectuated in order to interfere with the organizational freedom of rank-and-file employees. See also, Brief for the National Labor Relations Board In Opposition To Certiorari in *Vail Mfg. Co. v. National Labor Relations Board*, October Term, 1947, No. 794, pp. 8-12.

¹⁰⁶ 61 Stat. 635, 1 U. S. C. (Supp. III), § 109.

is proffered him (R. 16, 17-18).¹⁰⁷ Petitioner contests enforcement of this order "requiring reinstatement and back pay for a supervisor" on the ground that it "is contrary to the policy and intent of the Congress. . . ." Pet. for Cert., p. 18.¹⁰⁸

Though the amendments may have relieved employers of the obligation to refrain from future discrimination against supervisory employees, it does not relieve them of liability for past infractions of duty. For, reinstatement with back pay is a "liability" preserved from extinguishment by the general saving statute, which in presently pertinent part reads as follows (61 Stat. 635, 1 U.S.C. § (Supp. III), § 109):

The repeal of any statute shall not have the effect to release or extinguish any penalty,

¹⁰⁷ The obligation to pay back wages is tolled for the period during which the Trial Examiner's Intermediate Report was outstanding (R. 16, 18). See *Phelps Dodge Corporation v. National Labor Relations Board*, 313 U. S. 177, 198, n. 7.

¹⁰⁸ The petition for certiorari does not challenge the other provisions of the Board's order, which, apart from the posting of appropriate notices (R. 18), require petitioner to cease and desist from discharging or otherwise discriminating against any employee because he has filed charges or given testimony under the Act, or in any other manner interfering with employees in the exercise of that right (R. 16, 17). Such conduct remains an unfair labor practice under Section 8 (a) (4) of the amended Act. An order, therefore, which prohibits subjecting *employees as a statutory class to such* conduct has a valid basis for future operation without regard to whether *supervisory employees in particular* may be embraced within its protection. *Briggs Mfg. Co.*, 75 NLRB 569, 574.

forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

The term "liability" embraces within its orbit every form of statutory responsibility. *United States v. Reisinger*, 128 U.S. 398; *Hertz v. Woodman*, 218 U.S. 205, 217-218. It is "a duty to another enforceable by sanctions."¹⁰⁹

The employee had a right under the statute to be free to testify, and the employer was under a duty to refrain from discriminating against him for that reason. If the employer does not comply, he is under an obligation, enforceable by the Board, to reinstate with back pay. This enforceable remedial obligation, designed to protect the employee against loss of his job and wages, is certainly a "liability" within the meaning of the general savings statute.

Accordingly, as the court below and two other courts of appeals have held (R. 165), the amendment of the original NLRA "did not extinguish" the employer's liability "to make restitution" for the wrongful discharge of a supervisor, and that "comprised" his "restoration . . . to his position . . .

¹⁰⁹ Judge Learned Hand concurring in *Krenger v. Pennsylvania R. Co.*, 174 F. 2d 556, 560 (C. A. 2).

and the payment of any loss he may have suffered meanwhile." Accord: *Eastern Coal Corp. v. National Labor Relations Board*, 176 F. 2d 131, 136-137 (C. A. 4); *National Labor Relations Board v. Edward G. Budd Mfg. Co.*, 169 F. 2d 571, 575 (C. A. 6), certiorari denied, 335 U. S. 908. This result is but one particularization of the common invocation of the general saving statute to preserve other statutory obligations incurred under the original NLRA. *National Labor Relations Board v. National Garment Co.*, 166 F. 2d 233, 236-237 (C. A. 8), certiorari denied, 334 U. S. 845; *National Labor Relations Board v. Mylan-Sparta Co., Inc.*, 166 F. 2d 485, 488 (C. A. 6); *National Labor Relations Board v. Gate City Cotton Mills*, 167 F. 2d 647, 649 (C. A. 5); *National Labor Relations Board v. Itasca Cotton Mfg. Co.*, 179 F. 2d 504, 506 (C. A. 5); *Marshall and Bruce Co.*, 75 NLRB 90.

In preserving the obligation to reinstate discriminatorily discharged supervisors with back pay, the general saving statute fulfills its manifest purpose which is to imbue with continuing vitality a liability incurred under a repealed statute. It was enacted to abrogate the common law rule that the repeal of a statute remitted the obligations incurred under it.¹¹⁰ To that end, the general

¹¹⁰ See *Hertz v. Woodman*, 218 U. S. 205, 216, for a statement of the common law rule. In *Eastman v. Clackamas Co.*, 32 Fed. 24, 33 (C. C. D. Oreg.), it is stated that the rule of remission by repeal "is an arbitrary one, and never had anything to commend it, except in the United States an undue sympathy

saving statute is to be "treated as if incorporated in and as a part of subsequent enactments," and it "must be enforced unless either by express declaration or necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect" to it. *Great Northern Ry. Co. v. United States*, 208 U. S. 452, 465. Neither by "express declaration or necessary implication" does "the law, as a whole," deny to supervisors reinstatement with back pay as redress for their wrongful discharge.

There is no "express declaration" remitting such obligations incurred under the original NLRA; on the contrary, Congress rejected a proposal by which they would have been released. Thus, a provision of Section 102 (c) of the bill which passed the House¹¹¹ provided that proceedings instituted under the original Act "shall not abate" if they "could have been maintained under the new Act." As the House Conference Report¹¹² stated, under that bill "proceedings under the old act were to continue under the amended act only if they could have been maintained if initiated

for wrongdoers, and in England an early prejudice among common-law judges against 'statute-made law'."

¹¹¹ H. R. 3020, 80th Cong., 1st Sess., (April 17, 1947) in 1 Leg. Hist. of the Lab. Man. Rel. Act, 1947, 209 (1948). See also, H. Rep. No. 245, 80th Cong., 1st Sess., 45.

¹¹² H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 61.

under the amended act. . . ." However, Congress eliminated that provision from the bill as enacted, thereby making it unmistakably clear that the power of the Board to redress harm done by conduct prohibited under the old Act was not conditioned upon such conduct still being illegal under the amendments.¹¹³

Nor is there any remission of incurred obligations towards supervisors by "plain implication." None is to be implied, as petitioner would have it, from the amendments' incorporation of special saving clauses in relation to other subjects. It is immaterial that Section 102 permits future performance of presently invalid union-security agreements for a limited period; that Section 103 likewise preserves Board certifications for a limited period; and that Section 302 (f) and (g) of Title III of the Labor Management Relations Act, 1947, defers the applicability of that section to existing contracts for a limited period and exempts certain welfare funds from its regulation. It is settled law that a special saving clause in the repealing act does not prevent the operation of the general saving statute "unless the special character of that clause by plain implication cuts down the scope and operation" of the general saving

¹¹³ See *National Labor Relations Board v. National Garment Co.*, 166 F. 2d 233, 237 and n. 6 (C. A. 8), certiorari denied, 334 U. S. 845; *National Labor Relations Board v. Clark*, 176 F. 2d 341, 343, n. 2 (C.A. 3).

statute. *Hertz v. Woodman*, 218 U. S. 205, 218.¹¹⁴ Since in this case nothing in the terms or operation of the special saving clauses impairs the general saving statute, the latter's full utilization is uninhibited. Indeed, in requiring that no liability shall be remitted "unless the repealing Act shall expressly so provide," the general saving statute stands "as a sentinel on guard" against release implied from the casuistry of "rules of construction," the "niceties of grammatical" parsing, or deduction from clauses "put in" to clauses "not put in." *United States v. Chicago, St. P., M & Q. Ry. Co.*, 151 F. 84, 93-94 (D. Minn.), affirmed, 162 Fed. 835 (C.A. 8), certiorari denied, 212 U. S. 579, cited with approval in *Great Northern Ry. Co. v. United States*, 208 U. S. 452, 469.¹¹⁵

Contrary to petitioner's contention (Br. 48-53), no remission of liability to reinstate supervisors

¹¹⁴ It has been so held repeatedly. *United States v. Reisinger*, 128 U. S. 398, 402; *Great Northern Ry. Co. v. United States*, 208 U. S. 452, 466-470; *United States v. Palletz*, 330 U. S. 812 (see the Government's Statement As To Jurisdiction, pp. 5-6); *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 119 and n. 11; *United States v. Carter*, 171 F. 2d 530 (C. A. 5); *Bowen v. United States*, 171 F. 2d 533 (C. A. 5); *Ex parte Sichofsky*, 273 Fed. 694, 696 (S. D. Cal.).

¹¹⁵ Moreover, when Congress wishes retroactively to eliminate a liability of the kind here involved, it knows how to do so unambiguously, for the same Congress which amended the NLRA enacted the Portal to Portal Act of 1947 (61 Stat. 84, 29 U. S. C. (Supp. III) 251), and that Act clearly and expressly cancelled statutory liability for overtime compensation for certain activity. See *Battaglia v. General Motors Corp.*, 169 F. 2d 254 (C. A. 2), certiorari denied, 335 U. S. 887.

with back pay as redress for a past wrong may be implied from the present policy ¹¹⁶ of the amended NLRA which denies future statutory protection to supervisory employees who wish to organize and bargain collectively.¹¹⁷ "Restitution to [a supervisor] may be accomplished by a single affirmative act, without the [employer's] incurring any continuing obligation with respect to the future organizational activity, if any, of . . . any . . .

¹¹⁶ For statements of present policy, see H. Rep. No. 245, 80th Cong., 1st Sess., 13-17; S. Rep. No. 105, 80th Cong., 1st Sess., 3-5; 93 Cong. Rec. 3423, 3836, 5014, 4136-4137, 3443, 6501, 4985, 3446.

¹¹⁷ Because the regulation of future conduct must be governed by current law (*National Labor Relations Board v. Sandy Hill Iron & Brass Works*, 165 F. 2d 660, 662 (C. A. 2); *National Labor Relations Board v. Clark*, 176 F. 2d 341, 343 (C. A. 3)), an order requiring an employer to observe for the future a relationship with his supervisory employees which the statute no longer requires is not enforceable. (*L. A. Young Spring & Wire Corp. v. National Labor Relations Board*, 163 F. 2d 905, 906-907 (C. A. D. C.), certiorari denied, 333 U. S. 837; *National Labor Relations Board v. Edward G. Budd Mfg. Co.*, 169 F. 2d 571, 579-580 (C. A. 6), certiorari denied, 335 U. S. 908). This is in consonance with the general principle that behavior in futuro is determined by an intervening change of law, whether the matter is in the process of adjudication (*Ziffrin, Inc. v. United States*, 318 U. S. 73, 78; *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 464; *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 201), or has gone to final action (*United States v. Swift & Co.*, 286 U. S. 106, 114-115; *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421; Fed. R. Civ. Proc., 60 (b) (5)), see brief for the National Labor Relations Board in *National Labor Relations Board v. Pittsburgh Steamship Co.*, No. 42, this Term, pp. 38-46.

supervisor. There is therefore no conflict between an order restoring [a supervisor] to his *status quo* and the rights of the [employer] under the Act as amended." *Republic Steel Corp.*, 77 NLRB 1107, 1111. To infer from the future immunity of an employer the release of a liability incurred in the past "is to take too narrow a view of the public policy involved" (*Eastern Coal Corp. v. National Labor Relations Board*, 176 F. 2d 131, 136-137 (C. A. 4)):

It is said that because supervisory employees are no longer protected by the Act, there is no public policy which requires their reinstatement, even though their discharge constituted an unfair labor practice at the time. We think that this is to take too narrow a view of the public policy involved. The supervisory employees were discharged for exercising rights which the statute at that time guaranteed them. Whatever changes may have been made in the Act, the public policy which it embodies certainly requires that relief be accorded for unfair labor practices and that employees wrongfully discharged through such practices be restored to their positions with reimbursement of the loss that they have sustained as a result thereof. The fact that the company may no longer be required to bargain with the supervisors union is no reason why the supervisors who have been wrongfully discharged should not be restored to their positions with reimbursement of their loss.

Indeed, since present policy must be determined by reading "the terms of the law, as a whole" (*supra*, p. 115), that is, the general saving statute read in conjunction with the repealing act, the reasons underlying the general saving statute are as pertinent to the determination of present policy as the reasons underlying the repeal. *Republic Steel Corp.*, 77 NLRB 1107, 1111-1112.¹¹⁸ In precluding the extinguishment of liability, the policy of the general saving statute is to protect persons who act in reliance upon existing law and to prevent rewarding wrongdoers who fail to observe prevailing standards. To withhold relief from persons who rely on the law as it stands is to disappoint their fair expectation that they are secure in the action they take. In this case, when Chairman, the discharged supervisor, was warned that he should not testify lest he fall "in bad graces with the company," he replied: "the Wagner Act . . . is the law of the land. There is nothing that I would be afraid of if I proceed lawfully" (R. 43). That view of his protection was well-founded, for though division existed within the Board as to

¹¹⁸ Thus, even in relation to criminal punishment, when the repealing act specifies a lesser term of imprisonment for the offense, the general saving statute prevails to require the imposition of the harsher punishment exacted by the superseded law, notwithstanding the manifest change in the penal policy. *United States v. Kirby*, 176 F. 2d 101, 104 (C. A. 2); *Lovely v. United States*, 175 F. 2d 312, 316-318 (C. A. 4); *Hurwitz v. United States*, 53 F. 2d 552 (C. A. D. C.); *Maceo v. United States*, 46 F. 2d 788 (C. A. 5).

whether any unit of supervisors was appropriate for collective bargaining,¹¹⁹ no doubt ever prevailed concerning their statutory immunity from employer discrimination,¹²⁰ and redress for discrimination had been extended in impressive numbers to supervisors throughout the administration of the original NLRA.¹²¹ The policy of the gen-

¹¹⁹ *Packard Motor Car Company v. National Labor Relations Board*, 330 U. S. 485, 492-493.

¹²⁰ *Soss Mfg. Co.*, 56 NLRB 348; *Packard Motor Car Company v. National Labor Relations Board*, 330 U. S. 485, 492, n. 3.

¹²¹ *Fruehauf Trailer Co.*, 1 NLRB 68, 76, enforced, 301 U. S. 49; *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, enforcing 1 NLRB 201, 222-225; *National Labor Relations Board v. American Potash & Chemical Corp.*, 98 F. 2d 488, 493 (C. A. 9), certiorari denied, 306 U. S. 643, enforcing 3 NLRB 140, 158-159; *National Labor Relations Board v. Remington Rand, Inc.*, 94 F. 2d 862, 870-871 (C. A. 2), certiorari denied, 304 U. S. 576, enforcing as modified, 2 NLRB 626, 678; *National Labor Relations Board v. Star Publishing Co.*, 97 F. 2d 465 (C. A. 9, enforcing 4 NLRB 498, 504-505; *Crossett Lumber Co.*, 8 NLRB 440, 466-467, 472-473; *National Labor Relations Board v. Luxuray, Inc.*, 123 F. 2d 106, 108-109 (C. A. 2), enforcing 16 NLRB 37, 42-45; *National Labor Relations Board v. Richter's Bakery*, 140 F. 2d 870 (C. A. 5), certiorari denied, 322 U. S. 754, enforcing 46 NLRB 447, 450, 474-479; *National Labor Relations Board v. Whiting-Mead Co.*, 148 F. 2d 817 (C. A. 9), enforcing 45 NLRB 987, 1015-1018; *Warfield Co.*, 6 NLRB 58, 61-64; *Atlantic Greyhound Corp.*, 7 NLRB 1189, 1196; *Horace G. Prettyman*, 12 NLRB 640, 655-656, or' r set aside on other grounds, 117 F. 2d 786 (C. A. 6); *Chambers Corporation*, 21 NLRB 808, 829-830; *Condenser Corp.*, 22 NLRB 347, 386-389, enforced, 128 F. 2d 67, 74-75 (C. A. 3); *Golden Turkey Mining Co.*, 34 NLRB 760, 776-779; *Soss Mfg. Co.*, 56 NLRB 348; *Hazel Atlas Glass Co. v. NLRB*, 127 F. 2d 109,

eral saving statute, by preventing the retroactive defeat of such incurred obligations, is a surety that there is indeed "nothing" to "be afraid of" in relying on law as it stands.

Furthermore, it guards against disparity of treatment, for though obligations may be incurred at the same time, processes to vindicate them march with unequal speed; and the failure to make restitution to Chairman because proceedings pertaining to him were uncompleted at the time of repeal, but giving redress to another supervisor because completed, is an inequity the saving statute averts.¹²² Finally, by exacting restitution from a wrongdoer despite repeal, those subject to regulation have less incentive to wager with time and future legislation to escape compliance with existing law.¹²³ In this respect, the policy of the sav-

117-118 (C. A. 4); *R. R. Donnelley & Sons Co. v. National Labor Relations Board*, 156 F. 2d 416, 420-421 (C. A. 7), certiorari denied, 329 U. S. 810; *American Steel Foundries v. National Labor Relations Board*, 158 F. 2d 896 (C. A. 7); *National Labor Relations Board v. Skinner & Kennedy S. Co.*, 113 F. 2d 667, 671 (C. A. 8); *Eagle-Picher Mining & Smelting Co. v. National Labor Relations Board*, 119 F. 2d 903, 911 (C. A. 8); *National Labor Relations Board v. Wells, Inc.*, 162 F. 2d 457, 458-459 (C. A. 9).

¹²² See *Hertz v. Woodman*, 218 U. S. 205, 220-221; *United States v. Delaware, L. & W. R. Co.*, 152 Fed. 269, 275 (S. D. N. Y.)

¹²³ In another context, the Board has found it necessary to reshape its back pay remedy so as to prevent recalcitrant employers from profiting by delay in granting reinstatement. *F. W. Woolworth Co.*, 90 NLRB No. 41, 26 LRRM 1185.

ing statute effectuates all law, present and repealed; it encourages statutory beneficiaries vigorously to assert their rights uninhibited by fear of withdrawn protection, and, in addition, it fosters prompt compliance with prevailing standards on the part of those subject to regulation by removing some of the profit in delay.

In sum, in "terms of the law, as a whole," no reason in policy exists for failing to reinstate a supervisor with back pay as redress for his discriminatory discharge.

The public character of the right redressed through reinstatement with back pay does not make the sanction imposed any less a "liability." A monetary award of back pay is designed to "restore to the employees in some measure what was taken from them because" of the employer's wrong and in this respect resembles "compensation for private injury." *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U. S. 533, 543.¹²⁴ In effecting "a restoration of the situation," by requiring "compensation for the loss of wages" and "offers of employment to the victims of discrimination" (*Phelps Dodge Corp. v. Na-*

¹²⁴ See also, *Social Security Board v. Nierotko*, 327 U. S. 358; *Agwilines, Inc., v. National Labor Relations Board*, 87 F. 2d 146, 150-151 (C. A. 5); *National Labor Relations Board v. Killoren*, 122 F. 2d 609, 611-612 (C. A. 8), certiorari denied, 314 U. S. 696; *National Labor Relations Board v. Sunshine Mining Co.*, 125 F. 2d 757, 761 (C. A. 9).

tional Labor Relations Board, 313 U. S. 177, 194), the Board, "as a public agency acting in the public interest" (*Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 265), secures "the protection and compensation of employees" (*Republic Steel Corp. v. National Labor Relations Board*, 311 U. S. 7, 10). But the public character of the right makes no difference as to the existence of a "liability." Notwithstanding the public character of the regulatory scheme under the price and rent control legislation, liabilities incurred prior to repeal were "not thereby washed out;"¹²⁵ the general saving statute served to sustain criminal prosecutions,¹²⁶ governmental suit to secure restoration of overcharges,¹²⁷ and treble-damage actions.¹²⁸ In like fashion, although each is invested with the public interest, the general saving statute preserves the liability to pay a tax (*Hertz v. Woodman*, 218 U.S. 205), and sustains a criminal prosecution for discrimination in the

¹²⁵ *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 119 and n. 11.

¹²⁶ *United States v. Palletz*, 330 U. S. 812; *Stillman v. United States*, 177 F. 2d 607, 619 (C. A. 9); *Bowen v. United States*, 171 F. 2d 533 (C. A. 5); *Rehberg v. United States*, 174 F. 2d 121 (C. A. 5).

¹²⁷ *United States v. Carter*, 171 F. 2d 530 (C. A. 5).

¹²⁸ *Peters v. Felber*, 66 Cal. App. 2d 1011, 1012-1013, 152 P. 2d 42. Treble-damage suits are a means of securing the enforcement of a statute in the "public interest" through private initiative. *Bruce's Juices, Inc. v. American Can Co.*, 330 U. S. 743, 751-752.

application of carrier rates (*Great Northern Railway Co. v. United States*, 208 U.S. 452). As to the first, the collection of taxes for the public treasury "is essentially a matter of public and not of individual concern."¹²⁹ As to the second, "It is the province of criminal law to secure social interests regarded directly as such, that is, dissociated from any immediate individual interests with which they might be identified."¹³⁰ Thus, the "liability" preserved by the general saving statute plainly embraces sanctions rooted in the public interest.

CONCLUSION

For the reasons stated it is respectfully submitted that the decision below should be affirmed.

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¹²⁹ *Massachusetts v. Mellon*, 262 U. S. 447, 487.

¹³⁰ Pound, *Criminal Justice In America*, 10 (1930).